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 Duration : Y M D
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IN THE COURT OF SESSIONS JUDGE, PUNE .
(Presided over by K.P. Nandedkar Addl. Sessions Judge, Pune)

Form No. XXXII
Part 'A'
(Title page of Judgment)
(Para 44(i) of Chapter VI of Criminal Manual)

Special POCSO CASE NO. 133/2014
 CNR NO: MHPU01-006588-2014

Yerwada Police Station C.R. No. 65-2014
u/s. 376 of I.P.C., u/s. 3, 4, 11, 12 of POCSO Act

Exh.No.82

COMPLAINANT		STATE OF MAHARASHTRA
REPRESENTED BY		Ld. A.P.P. Mrs. Kale. Ld. APP Mr. M.B. Wadekar.
ACCUSED		Vinayak Shantwan Shinde, Age: 28 Yrs., Occu.: Service, R/at: S. No.2, Mother Teresa Nagar, Gadital, Yerwada, Pune.
REPRESENTED BY		Ld. Adv. Mr. R.G. Chouhan, (For accused)

Part 'B'**[Para 44(ii) of Chapter VI of Criminal Manual]**

Date of Offence	20.12.2013
Date of FIR	11.02.2014
Date of Charge-sheet	05.06.2014
Date of Framing of Charges	02.08.2014
Date of Commencement of evidence	07.09.2015
Date of which judgment is reserved	01.12.2023
Date of the Judgment	04.12.2023
Date of the Sentencing Order, if any	- ' ' -

Accused Details

Rank of the Accused	Name of Accused	Date of Arrest	Date of Release on Bail	Offences charged with	Whether acquitted or convicted	Sentence Imposed	Period of Detention Undergone during Trial for purpose of Section 428 Cr.PC.
	Vinayak Shantwan Shinde	12.02.2014	26.05.2014	376 IPC 3, 4, 11, 12 POCSO Act	convicted	u/s-376 IPC Imprisonment for life and fine of Rs.50,000/- idsi 3 months. Sec. 3,4 POCSO Imprisonment for life and fine of Rs.50,000/- idsi 3 months	3 months 14 days

Part 'C'**[Para 44(iii) of Chapter VI of Criminal Manual]****LIST OF PROSECUTION / DEFENCE / COURT WITNESSES****A. Prosecution :**

RANK	NAME	NATURE OF EVIDENCE (Eye witness, Police witness, Expert witness, Medical witness, Panch witness, other witness)
PW-1	(name not disclosed as provided by S.23(2) POCSO)	Informant victim

PW-2	Mayuri Madan Joshi	NGO Social worker
PW-3	Leelabai Kalaiyaa Swami	Panch witness
PW-4	Laxmi Uttam Waghmare	Friend of victim - witness
PW-5	Kranti Agnihotri Dabir	NGO - Social worker
PW-6	Bhanudas Pandurang Khandve	Headmaster of the school of victim
PW-7	Daniel Ramesh Landge	Spot panch
PW-8	Sakshi Abhinav Zawar Mundada	Expert witness medical officer
PW-9	Rekha Shamrao Shahare	Investigating Officer

B. Defence Witnesses, if any :

RANK	NAME	NATURE OF EVIDENCE (Eye witness, Police witness, Expert witness, Medical witness, Panch witness, other witness)
DW1	-	-
DW2	-	-

C. Court Witnesses, if any :

RANK	NAME	NATURE OF EVIDENCE (Eye witness, Police witness, Expert witness, Medical witness, Panch witness, other witness)
CW1	-	-
CW2	-	-

LIST OF PROSECUTION / DEFENCE / COURT EXHIBITS

A. Prosecution :

Sr. No.	Exhibit Number	Description
1	Exh.7	Complaint
2	Exh.46	Seizure panchanama
3	Exh. 53	Copy of entry No. 1706
4	Exh.54	School leaving certificate of victim

5	Exh.58	Medical examination report.
6	Exh.63	Portion marked 'A' from Complaint
7	Exh.64	Report by IO to Sr. PI for registering crime
8	Exh.65	Spot panchanama
9	Exh.66	Personal Search panchanama
10	Exh.67	Letter to school of victim for age certificate
11	Exh.68	Birth Certificate
12	Exh.69	Letter forwarding seized property to CA
13	Exh.70	Report to CJM for statement u/s. 164 Cr.PC.
14	Exh.71 to 73	Reports of chemical analysis from Forensic lab.

B. Defence :

Sr. No.	Exhibit Number	Description
1	Exh.	-
2	Exh.	-

C. Court Exhibits :

Sr. No.	Exhibit Number	Description
1	Exh.13	Letter for adding CA report in record.

D. Material Objects :

Sr. No.	Material Object Number	Description
1	Article 2	-Salvar of informant victim
2	Article 3	-Kurti of informant victim
3	Article 4	-Knicker of informant victim
4	Article	-underpant of accused worn by him

JUDGMENT
(Delivered on 4th December 2023)

Accused Vinayak Shantwan Shinde has faced the trial for the offence punishable under Section 376 of Indian Penal Code (hereinafter referred as IPC), Section 3, 4, 11, 12 of Protection of Children From Sexual Offences Act 2012 (hereinafter referred as POCSO), as he came to be prosecuted by the State through Yerwada Police Station, Pune.

2] Facts which gave rise to the prosecution case are that Informant/ victim aged 16 years has lodged report Exh.7 on 11.02.2014 contending that she was residing with her mother at Sy. No.43, Thubenagar, Behind Balaji Hospital, Chandannagar, Kharadi, Pune. She was studying in 9th standard in C Division, in Netaji Subhash Chandra Bose Vidyalaya New Khadki, Airport Road, Yerwada, Pune and her mother was serving as nurse at Victoriya Kids, Kharadi. Her father died in April 2013. Her school timings were between 7.00 a.m. to 12.00 p.m. from Kharadi she goes upto Gunjan Talkies by PMT bus and from Gunjan Chowk she goes to her school by walk, however, while returning from the school as the bus does not stop at Gunjan Chowk, she goes by walk upto bus stop, which is at Gadital Yerwada and from that bus stop she goes to her home by PMT bus.

3] It is mentioned in First Information Report that in the month of December 2013 after her school hours, when she

was going by walk, she became thirsty, hence, she had water from a tea stall, which was adjoining to road and while she was consuming water, one boy came to that place. Said boy asked her name and address. Hence, she told said boy her name, address and the class in which she is studying. Thereafter, said boy had written down his mobile number on one paper and handed over said chit to her. That time informant victim got annoyed hence, she torned said chit and she threw it away towards said boy and she went by walk upto the bus stop. That time said boy followed her by walk and when she asked said boy his name, he told his name as Vinod Shantanu Shinde. Thereafter, daily when informant victim used to go from her school to Yerwada Gadital bus stop, said boy used to follow her and he used to say that she looks beautiful, he likes her. However, informant victim used to neglect those talks in spite of it said boy used to follow her and he used to ask her to accompany him to his home.

4] It is further mentioned in First Information Report that on 20.12.2013 informant victim as usual went to school and after 12-00 noon after her school when she was going by walk to Yerwada Gadital Bus stop, said boy Vinod Shinde came near informant victim again said her that he likes her very much and asked her to accompany him to his house saying that he loves her. That time said boy caught hold her hand and said her that he offers oath to victim and therefore, she should come to his home. As mentioned in First Information Report that time

informant victim got frightened and hence, said boy Vinod Shinde carried her by one lane from fish market Yerwada to his house, thereafter, he had closed the door of said house and that time there was no one in said house. On the ground floor of said house one cot, table etc were kept in the kitchen and from said room there was a iron staircase. Said boy Vinayak Shinde carried informant victim by said staircase to the room situated on the upper floor and in said room he took victim informant close to him, said to her that he will marry her, thereafter, he had removed her clothes as well as his clothes and committed sexual intercourse with her. Due to said incident informant victim was frightened but she had not narrated the incident to her mother as she felt that her mother would get annoyed with her. However, after few days she narrated said incident to her classmate Laxmi Waghmare and Laxmi had told said incident to other girls from the class, hence, those girls also enquired with victim informant. Laxmi Waghmare was attending a course at India Sponsorship Institute Yerwada, Pune and Laxmi Waghmare had narrated the above incident happened with victim informant to the persons of said institute therefore, Smt. Mayuri Joshi and Kranti Agnihotri of said institute had come to the house of informant victim and they narrated above incident occurred with victim to her mother. Thereafter, informant along with her mother and the ladies from above referred institute went to police station and lodged the report.

5] On the basis of above report CR No. 65/2014 for the offence punishable under Sections 376 of IPC along with offence punishable under Section 3, 4, 11 and 13 of POCSO Act came to be registered with Yerwada police station and its investigation was carried out by PSI Rekha Shahare. During investigation on 11.02.2014 she had recorded statements of witnesses - PW-5 Kranti Agnihotri, Naseem Maheboob Shaikh and Mayuri Joshi, on the same day, after accepting complaint Exh.7. On the same day on 11.02.2014 she has visited the spot of incident and prepared the spot panchanama Exh.65 and also prepared sketch map attached with Spot panchanama. On 12.02.2014 she had referred victim to Sassoon Hospital Pune and got the victim medically examined, on 12.02.2014 vide seizure panchanama Exh.46 she seized clothes of victim, on 12.02.2014 PSI Nandekar had arrested accused Vinayak Shinde and PSI Nandekar had seized underwear of accused under arrest and personal search panchanama Exh.66. On 14.02.2014 vide letter Exh.67, she requested Head Master of Netaji Subhash Chandra Bose High School Yerwada, Pune for providing victim's age certificate/ bona-fide certificate and in response to letter Exh.67 Head master of Netaji Subhash Chandra Bose school had provided her the birth certificate of victim, which is at Exh.68. On 16.02.2014 she has recorded statements of witnesses Nitin Phalke and Danial Landage, on 21.02.2014 along with letter Exh.69 she had sent the seized muddemal to forensic lab for chemical analysis. On 05.03.2014 she had recorded statement of Laxmi Uttam Waghmare, the friend of victim as stated by said

witness, on 02.04.2014 she had submitted report Exh.70 before CJM Pune and requested for recording statement of victim under Section 164 of Cr.PC. On 05.04.2014 she had produced victim before JMFC Court No.9, Pune and got recorded statement of victim under Section 164 of Cr.PC. On 15.05.2014 she had recorded statement of witness Janardan Tonde and Amit Suresh Jadhav. She received the reports Exh.71, 72 and 73 of chemical analysis from Forensic Lab and as in investigation it was revealed that accused had committed alleged offence and as the strong evidence against him was available, she has submitted charge-sheet against accused in court.

6] My learned predecessor has framed charge Exh.2 for the offence punishable under Section 376 of IPC along with Section 3, 4, 11 and 12 of POCSO Act. Vide plea statement at Exh.3, accused pleaded not guilty and claimed to be tried. Hence, trial proceeded.

7] Prosecution has examined in all 9 witnesses and closed its evidence by filing evidence close pursis Exh.75. Thereafter, I have recorded statement of accused under Section 313 of Cr. P .C., which is at Exh.77. While cross examining prosecution witness and while giving answers to the questions put forth under Section 313 of Cr.PC., accused has advanced defence of total denial. Thereafter, I have heard arguments of learned APP Mr. Wadekar and learned defence advocate Mr. Chouhan.

8] Learned APP Smt. Kale strongly argued that from the evidence on record prosecution has proved the charge levelled against the accused beyond reasonable doubt. It is further argued that allegations made against accused are proved by prosecution as victim, who is examined as PW-1 in this case has deposed about the incident dated 20.12.2013 and she has also deposed about informing said incident to her friend Laxmi Waghmare and she has also deposed about lodging the complaint, however, PW-1 has deposed in her examination in chief that she was not knowing the accused present before the court.

9] It is pointed out that PW-1 victim has stated that portion marked 'A' Exh.63 from First Information Report Exh.7 was not stated by her before police and said portion is not correct, however, PW-9 Investigating Officer has proved those contents by deposing that those contents were stated by victim informant before PW-1 while lodging First Information Report Exh.7. Learned APP argued that victim had admitted in her examination in chief that contents of Exh.7 are correct. Thus, it becomes clear that the allegations made in Exh.7 are proved to be correct as deposed by PW-1.

10] It is pointed out that PW-2 Mayuri Joshi has deposed about the fact that Laxmi Waghmare disclosed PW-2 that sexual offence was committed with victim, thereafter, Mayuri Joshi and Kranti Agnihotri approached to the parents of victim and victim

had narrated the incident to her parents. Thereafter, victim had lodged First Information Report with police.

11] It is pointed out that PW-3 has proved the seizure of the clothes of victim and PW-4 Laxmi Waghmare has deposed before the court about the fact that victim had told her about the incident and about sexual assault made by accused with victim. Learned APP pointed out that PW-6 has proved the General Register of the school of victim, which is showing the date of birth of victim as 27.12.1997. It is also pointed out that PW-6 has proved the copy of the school leaving certificate of victim, which is at Exh.54 and from said school leaving certificate it becomes clear that the prosecution has proved the date of birth of victim as 27.12.1997. It is pointed out that PW-8 Dr. Sakshi Mundada has proved medical report of victim Exh.58 and doctor has deposed that as per the history narrated by victim and as per the clinical examination of the victim, PW-8 had the opinion that victim had penetrative vaginal sexual intercourse. It is argued that Investigating Officer has proved spot panchanama Exh.65 and Investigating Officer has also proved the arrest and seizure of the clothes of accused. It is pointed out that the birth certificate of victim is produced and proved by PW-9. Said birth certificate is issued by PMC school, which is at Exh.68, shows that date of birth of victim is 27.12.1997. Hence according to learned APP from the evidence on record prosecution has proved the fact that accused has committed the offence of rape with victim, who was under the age of 16 years at the time of

incident. Hence, according to learned APP prosecution has proved the charge levelled against accused beyond reasonable doubt. Therefore, according to learned APP accused is necessary to be convicted.

12] Learned advocate for accused has filed written notes of arguments which are at Exh.82 and he has submitted that court may consider those written notes of arguments and he has also made oral submissions. It is argued that there are two major factors that are usually required to be proved by prosecution in POCSO trial. The first is that prosecution has to prove that age of the victim was below 18 years at the time of incident and it is a pre requisite for proving the charge under POCSO Act. Further according to learned advocate for prosecution the second factor which is necessary to be proved is the actual commission of the offence. It is pointed out that as the prosecution case is that accused had committed forcible sexual intercourse with minor victim, the entire case of prosecution is based on the evidence of informant victim PW-1, who has lodged First Information Report after lapse of two months of the incident.

13] It is argued about the conduct of victim that on perusal of her testimony it transpires that victim has not entirely supported the case of prosecution. She was declared hostile by prosecution and in her cross-examination by prosecution victim has denied few portion of Exh.7. She has denied that in

December 2013 accused chased her, expressed his affection towards her and victim has also denied the instances of getting acquaintance with accused.

14] It is argued that victim is well conversant with the locality. Her school and place of residence are situated in thickly populated area. She has admitted that there is always 24 hours traffic of vehicles and people, moreover, there are number of traffic signals guarded by police. According to advocate for defence in such a situation the prosecution case is out of any stretch of imagination and it cannot be believed that accused forcibly took victim from such crowded place to his room. It is argued that moreover, if at all any alleged incident of sexual assault would have occurred, victim would have complained about the pains to her friends or relatives. It is pointed out that in present matter there is no such case of prosecution, which suggest that there was forcibly sexual intercourse occurred between victim and accused. According to advocate for accused it is odd to believe that victim did not narrate immediately the incident to her mother or anyone from the house.

15] Learned advocate for accused argued about the understanding of victim that from cross-examination of victim it reveals that she had knowledge about condoms, contraceptive pills and her close friends had conversations regarding having boy friend. According to learned advocate for accused this fact shows that victim is not illiterate or socially backward, she had

knowledge about her surrounding social phenomena. She was not a child of tender age, who was unable to think for herself. She was capable of knowing what was good and what was bad for her. She was not uneducated or village girl but she was allegedly a student of 9th standard who had probably lived in modern society like Pune and was thus, far more capable of thinking for herself and acting on her own than perhaps and unlettered girl hailing from a rural area, hence, according to advocate for accused, it can be easily construed that victim was not minor and she had attained age of majority. Moreover, her mental state also suggests the same.

16] In respect of delay of lodging First Information Report learned advocate for accused argued that alleged incident had occurred on 20.12.2013, however, First Information Report is lodged on 11.02.2014 i.e. after delay of two months. It is argued that there is no cogent explanation for such huge delay. Moreover, the victim has admitted that the social workers from NGO namely India Sponsorship Committee had compelled her to lodge First Information Report. Hence, according to learned advocate for accused the inordinate unexplained delay was caused for filing baseless and concocted First Information Report. It is argued that victim has admitted that members from above referred organization were adamant enough to register the offence irrespective of varicosity of information.

17] In respect of previous conduct of victim it is argued on behalf of accused that from the cross-examination of the victim it is revealed that previously she had filed complaint with similar allegations against another person, however, said matter was settled. Said matter went to police station and before police said person gave the undertaking that he will not contact victim, he will not keep any relation with victim, therefore, said person was set free by police.

18] In respect of the age of victim, learned defence advocate argued that as the charge is framed against accused under provisions of POCSO Act, the most crucial and important thing is that age of victim must be proved. According to advocate for accused the first and foremost ingredient under POCSO Act is that the victim should be minor, however, according to advocate for accused prosecution has failed to prove this very fact because victim has nowhere stated her date of birth, she has not stated that she is minor. Moreover, prosecution has also not brought anything on record from the victim herself regarding her age or regarding the fact that whether she is minor or not. Victim has admitted that she does not know that in which hospital and in which year she was born.

19] In respect of evidentiary value of school leaving certificate it is argued on behalf of accused that the Evidence Act has laid down the fine line between admissible evidence and its evidentiary value. According to advocate for accused school

leaving certificate Exh.54 would be admissible evidence, however, the admissibility of such document would be of not much evidentiary value to prove the age of the girl in absence of the material on the basis of which the age was recorded. According to advocate for accused the date of birth mentioned in school leaving certificate would have no evidentiary value as the person who has made entry or who gave the date of birth is not examined. It is argued that PW-6 neither has issued school leaving certificate nor did he make entry about date of birth in school register. Therefore, according to advocate for accused reliance cannot be placed on evidence of PW-6 regarding age of victim.

20] In respect of failure of prosecution to produce admissible evidence of proof of age it is argued by learned defence advocate that parent/ relative of victim is not examined by prosecution who had given alleged date of birth to school. Therefore, the entry in school leaving certificate and register of the school cannot be relied upon to definitely fix the age of the victim. It is argued that evidence of PW-9 shows that she had not obtained the birth certificate of victim either from Municipal Corporation or from any competent authority under the birth and registration Act. It is argued that no ossification test report of victim is produced on record. Therefore, according to learned advocate for accused the evidence of prosecution witnesses does not inspire confidence and said evidence is not trustworthy to prove date of birth of victim. Hence, according to learned

advocate for accused, prosecution has miserably failed to prove the fact that on the date of alleged incident of rape, victim was child within the meaning of Section 2(1)(d) of POCSO Act.

21] In respect of presumption under Section 29 of POCSO Act it is argued that provisions of POCSO Act are stringent in nature as there is a statutory presumption under Section 29 of the Act. Since the enactment is stringent one, the degree of proof is very strict. The prosecution has to prove the age of victim to show that at the time of incident she was a child within the meaning of the provisions of POCSO Act. In the light of well settled legal position in so far as the presumption under Section 29 of the POCSO Act is concerned, it becomes clear that though the provision states that the court shall presume that accused has committed offence for which he is charged under the POCSO Act, unless the contrary is proved, presumption would operate only upon prosecution first proving foundational facts against accused beyond reasonable doubt. Unless prosecution is able to prove foundational facts, in the context of allegations made against the accused, the presumption under Section 29 of the POCSO Act, would not operate against accused. Even if prosecution establishes such facts, accused can rebut the presumption by discrediting prosecution witnesses through the cross-examination showing that the story of prosecution is improbable. According to advocate for accused in present case prosecution has failed to prove the age of victim which is the very first ingredient of POCSO Act, hence, the

presumption under POCSO Act is not applicable against the accused.

22] In respect of presumption under Section 114-A of Evidence Act advocate for accused-applicant argued that in rape cases, the presumption under Section 114(a) of Indian Evidence Act would apply only after sexual intercourse is proved. The defence has to disprove the fact of consent. In present case according to advocate for accused prosecution has miserably failed to prove that accused had committed sexual intercourse with victim. According to him there is no medical evidence on record, which would suggest that accused had committed forcible sexual intercourse with accused.

23] It is further argued that the admissions of victim regarding alleged incident and interference of social workers in lodging First Information Report after lapse of two months of alleged incident vitiates case of prosecution. According to advocate for accused medical evidence also does not support case of prosecution. Hence, according to him presumption under Section 114(a) of Indian Evidence Act is not applicable against accused as the sexual intercourse is not proved.

24] In respect of evidence of PW-2 Mayuri Madan Joshi and PW-5 Kranti Agnihotri Dabir it is argued that evidence of those witnesses is crucial for adjudication of present case as both those witnesses are social workers connected to an NGO namely

India Sponsorship Committee in respect of evidence of PW-4 Laxmi Uttam Waghmare it is argued that she used to work with above NGO and PW-4 has informed alleged incident to PW-2 and 5 thereafter, PW-2 and 5 persuaded victim to lodge First Information Report.

25] In respect of evidence of PW-2 Mayuri Joshi it is argued that on perusal of evidence of said witness it is revealed that PW-2 has stated that she has received the information about the incident in the end of December 2013, however, said witness being social worker was aware about POCSO enactment, yet she chose to keep mum and has not approached police. She stated that First Information Report was lodged by the mother of victim in January 2014 and thereafter, statement of PW-5 was recorded on the date of lodging First Information Report. However, according to advocate for accused, both above statements of PW-5 are false and misleading because First Information Report was lodged by victim herself in February 2014 and statement of PW-2 was recorded in February 2014. hence, according to advocate for accused evidence of PW-2 suffers from contradiction and it cannot be relied upon as said witness has led hearsay evidence.

26] It is argued that PW-2 has stated that she had guided the victim to lodge First Information Report therefore, according to advocate for accused it can be easily construed that the First Information Report was given due to insistence of PW-2 and said fact is corroborated by testimony of victim, who has stated that

those two witnesses were over active, adamant and compelled victim to lodge First Information Report. It is argued that even after the knowledge of the incident PW-2 has not carried victim to hospital and she immediately did not inform the incident to police. On the contrary PW-2 and 5 waited and prepared victim to lodge the First Information Report at their instance.

27] In respect of evidence of PW-5 Kranti Agnihotri Dabir, a social worker, it is argued that said witness has guided and taught victim to lodge First Information Report as per versions of PW-2 and 5. It is pointed out that PW 5 has admitted that from December 2013 to February 2014 PW-2 and 5 were in constant touch with victim and he has further deposed that due to their counseling there was delay in lodging First Information Report. According to advocate of accused conduct of PW-5 is highly doubtful. He has deposed that she being social worker, was involved in social welfare of minor. However, upon receipt of information of alleged incident with victim, PW-5 did not contact victim, she did not approach parents of victim and she did not inform the incident to police, which is mandatory as per POCSO enactment. It is pointed out that PW-5 was present at the time of lodging of First Information Report and it is alleged that PW-5 has instructed and tutored victim and victim's mother to give their statement to the police hence, according to advocate for accused, possibility of exaggeration and falsification cannot be overruled.

28] In respect of evidence of PW-4 Laxmi Waghmare the friend of victim, it is argued that PW-4 is the person to whom victim has narrated the alleged incident and thereafter, PW-4 had informed it to PW-2 and 5. Statement of PW-04 was recorded after lapse of almost a month though she was present in police station at the time of lodging First Information Report. It is argued that said delay caused in recording statement of PW-4 is not explained which vitiates sanctity of evidence of PW-4 as according to advocate for accused said statement is after thought and recorded to support case of prosecution. It is pointed out that PW-5 has admitted that herself along with PW-1, 2 and 4 went to police station to lodge First Information Report. However, PW-5 states that PW-1 may have lodged First Information Report after 4 to 5 months after informing alleged incident to PW-2. Hence, according to advocate for accused, it can be seen that PW-4 has knowledge about lodging of First Information Report and she has admitted that alleged incident may have occurred 4 to 5 months prior to lodging of First Information Report. Hence, according to advocate for accused this fact shows that alleged incident has not occurred in December 2013 as per the version of victim.

29] In respect of the place of incident it is argued that so far as the place where alleged incident occurred, victim has admitted that it is thickly populated area adjacent to fish market. The area including lane is thickly populated hence, it is clear that alleged incident occurred in thickly populated area

where the houses are adjacent to each other. Hence, according to advocate for accused, it is highly improbable that victim, a school going girl, wearing a school uniform was being dragged and nobody noticed it or nobody had come for her help. Hence, according to advocate for accused, there is no evidence to prove that victim was forcibly taken to alleged spot of incident. Further it is argued that victim was knowing that if she would have raised alarm, the people nearby would come forward to help her but she did not do so. Hence, according to advocate for accused said fact vitiates prosecution case.

30] In respect of evidence of PW-8 Dr. Sakshi Zawar it is argued that said witness has conducted medical examination of the victim, however, she has admitted that there are number of reasons for hymenal tears like cycling, racing and masturbation. She has admitted that she is unable to depose exactly that whether hymen rupture was due to penetration or due to any other reason. According to advocate for accused in this scenario it needs to be seen that whether there are any injuries or signs of force upon victim. However, it is seen that there are no injuries on the person of victim. Hence, according to advocate for accused said fact makes it clear that there was no use of force against victim.

31] In respect of history of victim and reasons of hymenal tears, it is argued that victim has admitted that prior to present case the victim was sexually assaulted by someone and

she had given clean chit as said person had given apology letter in presence of police person. Hence, according to advocate for accused, the possibility of hymenal rupture may have been the result of previous sexual assault, as the age and nature of alleged hymenal ruptures has not been mentioned in medical certificate. Hence, according to advocate for accused the medical evidence on record is of no use to prosecution and said medical evidence does not inspire confidence to support case of prosecution.

32] It is argued that there is no evidence to show that there was external injury on victim's private parts and hence, according to advocate for accused prosecution was not able to establish that there was any aggravated or forcible penetrative sexual assault as result of coercion or compulsion on the part of accused.

33] It is argued that prosecution has not examined any independent witness to prove its case. It is alleged that PW-2, 4 and 5 examined by prosecution are interested witnesses and they are highly motivated in the name of social cause to implicate the accused despite the veracity and truthfulness of the fact, hence, according to advocate for accused there is every possibility that those witnesses driven by vendetta, grudge, and ulterior motive would have exaggerated alleged incident and they would have falsely implicated accused for their own reasons. It is argued that investigation officer could have

recorded statements of the residents from the area of alleged spot of incident, however, such statements are deliberately suppressed under the pressure of social workers i.e. PW-2 and 5.

34] In respect of scientific evidence it is argued that there is no scientific evidence available on record to show the complexity of accused in present matter. The report of chemical analysis is inconclusive and does not show involvement of accused. Hence, it is of no use.

35] It is argued that there was no material placed on record by prosecution to show that victim and accused were familiar to each other, there is no evidence to suggest that accused was involved with victim and there is no explanation offered to show that as to why accused would marry the victim in absence of the fact that accused and victim were not previously familiar to each other. It is further argued that victim has admitted that she was in love with accused and when she came to know that accused is married, in the spirit of grudge and vengeance, she has filed false case against accused. It is argued that mother of the victim is not examined by prosecution even though there was no hurdle in examining her and further statements of nearby residents are not recorded in investigation.

36] It is argued that sole testimony of prosecutrix can be believed however, her evidence should have sterling quality, it should inspire the confidence when tested on touch stone of

cross-examination. It is argued that in cross-examination victim could not withstand, her conduct after incident is doubtful, there are major contradictions regarding alleged incident. Hence, considering the tenor of her evidence in broader picture according to advocate for accused, it will be proper to say that prosecution has failed to prove charge beyond reasonable doubt against accused as nothing incriminating has come on record against accused. It is argued that since there are major contradictions and omissions in the evidence led by prosecution, said evidence creates doubt about prosecution case. There is no cogent material and evidence against accused to show that he had committed aggravated sexual intercourse with victim and there is no corroboration by victim. It is further argued that PW.2 4 and 5 are interested witnesses and their evidence needs to be assessed with due care and caution as there is exaggeration and as there are contradictions in their evidence, hence, their evidence does not inspire confidence. Hence, according to advocate for accused prosecution has failed to bring on record trustworthy legal evidence to suggest that accused is perpetrator of the crime in question. Hence, advocate for accused has prayed to acquit accused.

37] In support of his arguments advocate for accused has placed his reliance on the following case-laws -

P. Yuvaprakash vs State Rep. By Inspector of Police – Criminal Appeal No.1898 of 2023 – (decided on 18th July 2013 INSE 626)

12. In view of [Section 34](#) (1) of the POCSO Act, Section 94 of the JJ Act, 2015 becomes

relevant, and applicable. That provision is extracted below:

“94. Presumption and determination of age. – (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under [section 14](#) or [section 36](#), as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

14. [Section 94](#) (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in [Section 94\(2\)\(i\)](#) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was

below 18 years at the time of commission of the offence.

19. It is clear from the above narrative that none of the documents produced during the trial answered the description of “the date of birth certificate from the school” or “the matriculation or equivalent certificate” from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim’s age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating “that the age of the said girl would be more than 18 years and less than 20 years”. In the cross-examination, she admitted that M’s age could be taken as 19 years. However, the High Court rejected this evidence, saying that “when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor”. This finding is, in this court’s considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what [Section 94](#) (2) (i) mandates; nor are they in accord with [Section 94](#) (2) (ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim’s bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9.

21. In her statement under Section 164 of the Cr. PC, the victim M had deposed that she was in love with the appellant, had consumed poison, and had even been hospitalized because she was adamant to live with the appellant. No doubt, she resiled from her statement. Yet, the medical evidence (deposition of PW-11, Dr. Kavitha) indicated that the victim had a ruptured hymen; there was no external injury at her private parts, and that according to her “48 hours before medical examination there was no evidence to show that she had sexual assault is the opinion given by me.” This witness also produced her Notes of examination (Ex. P-11). In view of these facts, this court is of the opinion that the prosecution was not able to establish that there was any penetrative sexual assault as a result of coercion or compulsion on the part of the appellant. Even the High Court recognized this, albeit while reducing the sentence (since, in its opinion, M was a minor at the time), observing that “PW.3 had gone to the extent of taking poison to commit suicide out of love failure, under enormous pressure, he had accompanied P.W.3, married her and had sexual intercourse with her, both before the marriage as well as after the marriage.” From these facts, and the definitions under POCSO Act, especially the definitions of “sexual assault”, [Sections 5](#) and [6](#), read with [Sections 350](#) and [351](#) IPC, it can be seen that it is only when there is penetrative sexual assault, which implies sexual contact with or without consent of the minor victim, that the offences under the POCSO Act are committed.

Alamelu and another vs State represented by Inspector of Police – reported in 2011 ALL Mr (Cri) 1278 (SC) -

The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under [Section 35](#) of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded.

40. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

43. We may further notice that even with reference to [Section 35](#) of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of Ravinder Singh Gorkhi Vs. State of U.P. held as follows:-

"The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a (2006) 5 SCC 584 party to the lis, having regard to the provisions of [Section 35](#) of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under [Article 21](#) of the Constitution, as in that case the accused may unjustly be convicted."

Prashant Ramchandra Kasarkar vs State of Maharashtra thorough Yavatmal Police Station – Criminal Appeal No. 66 of 2019

- PW-3 Dashrath Sasane – who is the father of the prosecutrix did not support the prosecution. In the cross-examination on behalf of the accused, PW 3 admits that the date of birth of the prosecutrix was recorded in the school by approximation and that she left the school three to four years prior to her admission in the hospital. The only other evidence on the age of the prosecutrix is PW 8-Mukund Bawne. PW 8 has proved the Bonafide Certificate Exhibit 58. PW 8 deposed that the Bonafide Certificate is prepared on the basis of admission and leaving register. PW 8 proves the school record in which the date of birth of the prosecutrix is recorded as 04-1-2001. It is elicited in the cross-examination that the prosecutrix was admitted in the school in the 8th Standard and that she was earlier studying in Zilla Parishad School, Pandhari. PW 8 states that the entry of date of birth of the prosecutrix is taken on the basis of leaving certificate issued by Zilla Parishad School, Pandhari. PW 8 is unable to state on the basis of which document was the entry of date of birth of the prosecutrix taken at the Zilla Parishad School, Pandhari. PW 8 is not aware as to who gave the information about the date of birth of the prosecutrix to Zilla Parishad, Pandhari. PW 8 candidly admits that he is not able to state as

to whether the date of birth of the prosecutrix is correct or otherwise.

- The prosecutrix was admitted in the 8th Standard in Vyankatesh Vidyalaya of which PW 8 is the Headmaster. PW 8 admits that the date of birth of the prosecutrix is recorded in the school records on the basis of the leaving certificate issued by the Zilla Parishad, Pandhari where the prosecutrix was first admitted. The prosecution has not examined the person who recorded the date of birth of the prosecutrix in the record of the Zilla Parishad, Pandhari. No evidence is adduced to show the basis on which the age of the prosecutrix is recorded in the first school which she attended. No attempt is made by the prosecution to bring on record, the name of the person who gave the information of the date of birth of the prosecutrix to the Zilla Parishad School, Pandhari. The primary material on the basis of which the entry of the date of birth is taken, is not proved and therefore, the school leaving certificate on which heavy reliance is placed by the learned Sessions Court, is of no evidentiary value.

- In the present case, while the school leaving certificate issued by the previous school is exhibited (Exhibit 60), no evidence is adduced to bring on record the source of the information on the basis of which the entry of date of birth is taken in Exhibit 60. No employee of the concerned school is examined and PW 8 who is the Headmaster of the School in which the prosecutrix was admitted in the 8th Standard is in no possession to vouch for the correctness of the date of birth recorded in Exhibit 60. It would be apposite to refer to the observations of the Hon'ble Supreme Court in *Alamelu & Another vs. State* represented by Inspector of Police, (2011) 2 SCC 385, which reads thus:

"- We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ext. P16 and the certificate issued by PW 8 Dr. Gunasekaran, Radiologist, Ext. P4 and Ext. P5.

- Undoubtedly, the transfer certificate, Ext. P-16 indicates that the girl's date of birth was 15-6-1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31-7-1993. The transfer certificate has been issued by a Government school and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer-certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

- We may notice here that PW 1 was examined in the Court on 9-8-1999. In his evidence, he made no reference to the transfer certificate (Ext. P16). He did not mention the girl's age or date of birth. PW 2 was also examined on 9-8-1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 Cr.PC. seeking permission to produce the transfer certificate and to recall PW 2. This petition was allowed. She was actually recalled and her examination was continued on 26-4-2000. The transfer certificate was marked as Ext. P16 at that stage, i.e., 26-4-2000. The judgment was delivered on 28-4-2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ext. P16 issued by the School and accordingly her date of birth noticed as 15-6-1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

- Considering the manner in which the facts recorded in a document may be proved, this Court in *Birad Mal Singhvi Vs. Anand Purohit*, observed as follows: (SCC pp. 618-19, para 14) "14... The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined ... Merely because the documents Exts. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere of the documents Exts. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand

and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi and of Suraj Prakash Joshi. In the circumstances, the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted. (emphasis supplied)

- The same proposition of law is reiterated by this Court in *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal*, where this Court observed as follows: (SCC p.751, para 16) "The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a proof of its contents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can vouchsafe for the truth of the facts in issue".

- In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate be relied upon to definitely fix the age of the girl.

- In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW 8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW 8, the X-ray expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

- In addition, the High Court failed to consider the expert evidence given by PW 13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in *Jaya Mala Vs. Government of J.& K.* In the aforesaid judgment, it is observed as follows: (SCC p.541, para 9)

- However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

Maherban Hasan Babu Khan vs The State of Maharashtra and another – 2023 ALL MR (Cri) 1962 -

- In the instant case, as stated earlier, the date of birth of the victim was recorded in the School Register of Vighavali Vibhag High School on the basis of the e School Leaving Certificate issued by Raigad Zilla Parishad School. PW7, the Head of Master, who had produced the School Register was admittedly not associated with the School on the date the said entry was effected. There is absolutely no evidence to prove as to who had given the date of birth of the victim as 19/12/2000 at the time of her initial admission in Raigad Zilla Parishad School. The prosecution has not examined the person who had recorded the date of birth of the victim in the School Register of Raigad Zilla Parishad or any other person conversant with the said fact.

Sandeep Janaji Konde vs The State of Maharashtra – 2016 ALL MR (Cri.) 1433 -

19- There is, therefore, nothing to show that the School Leaving Certificate (Exhibit-28) contains an accurate record of the entries in the General Register maintained by the said New English School, even if the question of the weight to be attached to such entries in the absence of knowledge of the source of these entries, is kept aside. No person who has copied the entries in the General Register maintained by the school in the School Leaving Certificate (Exhibit-28), has been examined.

20- Even if it is presumed that the School Leaving Certificate contains an accurate record of the entries made in the General Register maintained by the New English School, it would Tilak 14/18 APEAL-956-10(J) be dangerous to come to the conclusion about the date of birth of the victim solely on that basis. What was important was the date of her birth mentioned in the School Leaving Certificate issued by the victim's earlier school. At the time of entering the date of birth in a School register, information about the same is given generally by someone - generally the parents of the child - and it is the knowledge of the person who gives that information is the basis of the entry. Here, when neither the father nor the mother gives the date of birth of the victim, and none of them is even asked about the date of birth, it would be dangerous to conclude that the date of birth of the victim mentioned therein, must be the correct date.

Whether the date of birth was satisfactorily proved would - like any other fact - need determination on consideration of all the relevant aspects of the matter. It is a cardinal principle of the rules of evidence that the best evidence such as the nature of the case would permit, must be given in all the cases. There could have been better evidence about the date of birth of the victim. The Investigating Officer could have easily procured the birth certificate, or other more satisfactory evidence regarding the date of birth of the victim when the age of the victim was the crucial factor in determining the guilt of the appellant. There is also no justification for not doing the ossification test. The Investigating Officer had the audacity to reply - when questioned in that regard in the cross-examination - that he did not do so because 'he did not feel it necessary'. It was suggested to him that actually he had sent the victim for medical examination, but since he received a certificate showing that she was aged more than 16 years, he did not produce it. This suggestion has been denied by him, and this aspect of the matter may be left at that, but the fact remains that Tilak 15/18 APEAL-956-10(J) no efforts to collect satisfactory evidence about the date of birth of the victim, were made. This was perhaps due to the fact that the case that was sought to be made out was of repeated sexual intercourse against the will and without the consent of the victim, in which case the question of age would not have been decisive.

21- I am unable to hold that, that the age of victim was below 16 years of age at the material time, was satisfactorily established in this case. In the light of the aforesaid weaknesses, in the evidence of this aspect, there arises a reasonable doubt about the age of the victim. At the cost of repetition, it must be held that when her own father says that she was at the material time 'of 16 years' does not give her date of birth; and the police report also refers to the victim as 'of 16 years', and when the court also understood the case put forth by the prosecution to be that the victim was 'aged 16 years' - as is evident from the charge framed, it would not be safe to conclude that she was certainly below 16 years of age at the material time.

Ramprasad Fagulal Amdare vs State of Maharashtra – 2018 ALL MR (Cri.) 4849 –

17. In the present case, when such a certificate was placed on record and the headmistresses of the schools attended by the prosecutrix were examined by the prosecution, it cannot be said that the prosecution had failed to place on record sufficient evidence and material to prove Cri.Appeal 579/17 13 Judgment that the date of birth of the prosecutrix was indeed 03.05.2000. In this regard, the judgment relied upon by the learned counsel appearing on behalf of the appellant, passed by the Hon'ble Supreme Court in the case of Alamelu Versus State (supra), cannot be of much assistance to the appellant because in the aforesaid case before the Supreme Court, although transfer certificate issued by the school was placed on record, headmistress of the school was not examined. It was for this reason that the Hon'ble Supreme Court, held that such a document could not be held to be reliable but, in the present case since two headmistresses were examined as witnesses by the prosecution to prove the aforesaid school leaving certificate, it cannot be said that the said judgment of the Hon'ble Supreme Court would be of any assistance to the appellant. Apart from this, learned A.P.P. for the respondent-State is justified in relying upon judgment of Division Bench of this Court in the case of Kundan Pendor Versus State (Supra), wherein it has been held that when the prosecutrix is not cross-examined on her statement about date of birth, the claim of the prosecutrix has to be accepted. In the present case also, the prosecutrix was not cross-examined on this aspect. Hence, no fault can be found with the findings rendered by the trial Court that the provisions of POCSO Act were applicable in the present case because the prosecutrix was a "child" as defined in [Section 2\(d\)](#) of the said Act.

22. In the present case, the prosecutrix had claimed that the appellant (accused), who happened to be the maternal uncle of her mother and who was living in the adjacent house, had pulled her inside his house and then he had taken her to the store room where he committed the act of forcible sexual intercourse. The evidence of the prosecutrix (PW1), her maternal aunt (PW5) and her father (PW6) shows that there is no direct access from the house of the appellant (accused) to the store room where the incident had allegedly occurred. In this connection, the map prepared by the prosecution while preparing the spot panchanama also becomes relevant. The spot panchanama is at Exhibit 58, which includes the sketch map of the place of the incident. A perusal of the same shows that there is no direct access from the house of the accused to the store room in question. In fact, the prosecutrix (PW1) in her cross-examination has stated to the effect that there are two doors to the house of the accused, one for going to his house and the other for going to the store room and both doors opened on the outside. The maternal aunt of the prosecutrix, i.e. PW 5 has stated in her cross- examination that it was indeed true that in order to go to the store room of the house of the appellant (accused), the way was from the front side. The father of the prosecutrix, i.e. PW 6 has also clearly stated in his cross- examination that it was true that in order to go to the store room of the house of the appellant (accused), the way was from the outside and that there was no way from the inside. The aforesaid evidence points towards the fact that if the incident had actually taken place in the store room, as claimed by the prosecutrix (PW 1), the appellant (accused) was required to take the prosecutrix out of his house from the door and to go around and enter the store room from the door for entering into the store room. This

would necessarily require the appellant (accused) to come out of the house and then enter the store room. Considering that the incident allegedly took place at about 10.00 a.m. in the morning in a colony of crowded hutments, it is difficult to believe that the appellant (accused) taking the prosecutrix (PW1) from the house to the store room would have gone unnoticed. Apart from this, PW6 (father of the prosecutrix) had admitted in the cross-examination that there was only a tin sheet between the house of the appellant (accused) and that of the prosecutrix. In such a situation, any forcible sexual intercourse by the appellant (accused) on the prosecutrix (PW1) would not have gone unnoticed, particularly when the hutments were located very close to each other. Therefore, there is doubt created about the manner in which the incident is said to have occurred.

23. Apart from this, the medical evidence on record shows that there was neither any blood nor semen found on the clothes of the prosecutrix. The medical examination report of the prosecutrix shows that the hymen was found to be torn, but, there were no injuries to the body or the private part of the prosecutrix. In the cross-examination, the doctor (PW4) has conceded that if the tear on the hymen was fresh then she would have written the said fact in the medical examination report. This leads to the conclusion that the tear in the hymen was not fresh. Although, this may not necessarily be a clinching point in favour of the defence, but absence of any injuries on the genitals or any other body part of the prosecutrix, coupled with the fact that the prosecutrix and the appellant could not have reached the store room without coming out of the house of the appellant, demonstrates that serious doubt is created about the manner in which the incident is said to have occurred in the present case.

24. In this backdrop, it becomes significant that the maternal aunt of the prosecutrix, i.e. PW5 has stated in cross-examination that the appellant (accused) used to scold the prosecutrix and her mother for various reasons. The appellant has also stated in his statement recorded under [Section 313](#) of Cr.P.C. that he was falsely implicated because he used to scold the prosecutrix and her mother. The appellant (accused) was admittedly the maternal uncle of the mother of the prosecutrix. It is probable that he would have been scolding the prosecutrix and her mother on certain issues that have been indicated by the defence. The aforesaid prosecution witnesses, i.e. PW5 and PW6, have indeed admitted this in the cross-examination. As the description of the incident of alleged forcible sexual intercourse appears to be doubtful for the reasons mentioned above, it is probable that the appellant (accused) was sought Cri.Appeal 579/17 21 Judgment to be falsely implicated by the prosecutrix and her mother in the present case. The complete absence of any medical evidence to support the claims of the prosecutrix and the doubt created by the evidence on record as regards the manner in which the incident was said to have occurred, demonstrates that on preponderance of probabilities, the appellant (accused) has been able to rebut the presumption under Section 29 of the POCSO Act.

25. In fact, for the presumption to operate, as observed earlier, it is necessary that the foundational facts are established by the prosecution, which in the present case, does not appear to have been done by the prosecution. This aspect has not been taken into consideration by the trial Court while holding against the appellant (accused). The findings rendered by the trial Court on the absence of any hue and cry raised by the prosecutrix as her family was already under "psychological and economic influence" of the appellant (accused) are also based on mere conjectures. The absence of an internal access

or door to the store room of the appellant (accused) has also been ignored by the trial Court and it has not been appreciated in the correct perspective while holding that the prosecution story could not be disbelieved.

26. Thus, on an overall analysis of the evidence and material on record, it becomes clear that the trial Court was not justified in holding that the case against the appellant (accused) had been proved beyond reasonable doubt and that he deserved to be convicted and sentenced in the aforementioned manner.

Navin Dhaniram Baralye vs The State of Maharashtra – 2018

ALL MR (Cri.) 4919 -

17. In this backdrop, it is first necessary to examine the effect of presumption under Section 29 of the POCSO Act and the manner in which the accused could rebut such presumption. Section 29 of the POCSO Act reads as follows:-

"29. Presumption as to certain offences - Where a person is prosecuted for committing or abetting or attempting to commit any offence under [sections 3,5,7](#) and [section 9](#) of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

A perusal of the above quoted provision does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.

23. The above quoted views of the Courts elucidate the position of law insofar as presumption under Section 29 of the POCSO Act is concerned. It becomes clear that although the provision states that the Court shall presume that the accused has committed the offence for which he is charged under the POCSO Act, unless the contrary is proved, the presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused. Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption. In either case, the accused is required to rebut the presumption

on the touchstone of preponderance of probability.

32. A bare reading of the aforesaid provision shows that under Section 26(4) of the POCSO Act, video recording of statement of the child is not mandatory because the words "wherever possible" have been used in the said provision. But, it would be certainly advisable that wherever it is possible and provision is available for video recording, the statement of a child victim in cases under the POCSO Act ought to be recorded by audio-video electronic means also. This would work both ways, on the one hand it would demonstrate that the child is indeed stating facts on his/her own volition and on the other hand it would also show whether the child victim is being prodded or tutored by anybody to make statement before the Police. This would be of assistance to the Court while deciding cases under the POCSO Act.

35. A proper analysis of the evidence of the prosecution witnesses and the medical evidence brought on record by the prosecution shows that the foundational facts necessary in the present case to raise presumption under Section 29 of the POCSO Act, have not been established beyond reasonable doubt by the prosecution. The defence has been able to demonstrate that the prosecution story cannot be believed and 34 appeal406-17.odt that, therefore, the presumption would not operate. A dispassionate analysis of the evidence and material on record also demonstrates that the present case could be a case of false implication or a complete misunderstanding of the situation by the complainant PW1 who seemed to jump to conclusions by making allegations against the appellant and thereafter making statements in the evidence which were material improvements over her own statements made to the Police. In this backdrop, it would be unsafe to hold that the prosecution had proved its case against the appellant under the provisions of the POCSO Act or even under [Section 377](#) of the IPC.

36. In the light of the above, the instant appeal is allowed. The impugned judgment and order passed by the trial Court is set aside and the appellant is acquitted of the charges levelled against him. Consequently, the appellant shall be released from custody forthwith, if not required in any other case.

Amol Dudhram Barsagade vs State of Maharashtra - 2019 ALL MR (Cri.) 435 -

3. The learned Counsel for the accused Shri A.K. Bhangde would submit that while there is no quarrel with the proposition that the conviction can rest solely on the basis of the testimony of the prosecutrix, the testimony must necessarily be implicitly reliable, trustworthy and confidence inspiring. Shri A.K. Bhangde would submit that if the evidence of the prosecutrix is not of sterling quality and if the evidence is not entirely reliable, it would be extremely hazardous to base the conviction on her sole testimony. Shri A.K. Bhangde would emphasize that the investigation is ineffective and incompetent at best and unfair at worst. It is indubitable, that the police did not make any enquiry with the victim, is the submission. It does not appear to be in dispute that the police did not record the statement of the victim. Exhibit 30 is a communication addressed by the Investigating Officer (PW.5) to the Magistrate at Chamorshi requesting that the statement of the victim be recorded under [Section 164](#) of the Criminal Procedure Code. The victim (PW.1) does state that her statement was recorded at Chamorshi. A Statement purportedly recorded by the learned 5 appeal600.17 Magistrate under [Section 164](#) of the Criminal Procedure Code on 28-10-2016 is on record. However, although the said statement was produced along

with the charge-sheet, no attempt was made by the prosecution to tender the said statement in evidence much less to prove the statement. The statement on record which purports to be the statement of the victim recorded under [Section 164](#) of the Code of Criminal Procedure is not referred to in the evidence of either the victim or the Investigating Officer. Exhibit 17 is a complaint written by the victim at the instance of the Headmaster (PW.2). This complaint was apparently forwarded by PW.2 to Police Station Ghot along with the report Exhibit 19. It has also come in the evidence of the Headmaster (PW.2) that a statement was also obtained from the accused and was made available to the police. The investigation depicts an extremely sorry state of affair. It is more than apparent that the investigation is not only ineffective and amateurish, the same dangerously borders on the unfair. The incident allegedly occurred when eighteen students of Class 10 were answering the Hindi paper. The victim was sitting on the first bench in the second row. The distance between the bench on which the victim was sitting and the first bench in the third row, is according to the victim, was barely nine inches. The failure of the Investigating Officer to record the statement 6 appeal600.17 of the students who were answering the Hindi paper along with the victim is inexplicable. The Investigating Officer was clearly not alive to his duty.

4. It is admitted by the victim that Hindi books were found on her desk by the accused. The victim was suggested that since the Hindi books were found or discovered by the accused, she left the examination hall crying. The defence, obviously, is that in order to escape the consequences of the unfair practice while answering the Hindi paper, the victim falsely implicated the accused.

5. The learned Additional Public Prosecutor Shri S.S. Doifode would strenuously contend that the statutory presumption under Section 29 of the POCSO Act is absolute. The date of birth of the victim 12-10-2001 is duly proved, and is indeed not challenged by the accused, and the victim, therefore, was a child within the meaning of Section 2(d) of the POCSO Act, is the submission. The submission that the statutory presumption under Section 29 of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act 7 appeal600.17 would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable.

6. The statutory presumption under Section 29 of the POCSO Act must be understood and tested on the anvil of the golden thread which runs through web of the criminal jurisprudence system in this country that an accused is presumed to be innocent till the guilt is conclusively established beyond reasonable doubt. In the factual matrix, at best, the prosecution has succeeded in bringing on record material giving rise to some suspicion. However, it is trite law that suspicion is not a substitute to proof. The gulf between "might have committed" and "must have committed" must be bridged by the prosecution by unimpeachable and confidence inspiring evidence. The fact that Hindi test books were found on the bench of the victim who was answering the Hindi paper, that the

Investigating Officer did not make any enquiry with the victim and that the Investigating Officer did not make any effort to record the statement of the seventeen students who were present in the examination hall when the incident allegedly happened, cumulatively creates a doubt, and the doubt is not a speculative or fanciful doubt, about the veracity of the version of the victim. The benefit of this nagging doubt must necessarily go to the accused.

Mangesh Wadekar vs state of Goa – 2023 ALL MR (Cri) 1352

Material discrepancies and contradictions in her testimony – her statement to sister regarding bleeding from private part found to be improvisation and exaggeration – No medical evidence to support her contention as injury in form of tear or abrasion etc. on her private parts clearly absent – Investigating Officer nowhere stated that blood-stained panty of victim was handed over to him or attached – Delay in filing complaint not explained – Deposition of sister and grandmother also found to be unreliable – Testimony of victim not found to be creditworthy – Accused appellant acquitted.

Thulia Kali vs State of Tamil Nadu – (1972) 3 SCC 393-

Apart from the discrepancy on the point as to whom was the person with whom the accused had kept the ornaments, we find that Thangam, with whom the accused, according to Kali Goundar PW had kept the ornaments, has not been examined as a witness. In view of the above statement of Kali Goundar, it was, in our opinion, essential for the prosecution to examine Thangam as a witness and its failure to do so would make the Court draw an inference against the prosecution.

Tomaso Bruno and another vs State of Uttar Pradesh – (2015) 7 SCC 178 -

27. The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made.

28. As per [Section 114](#) (g) of the [Evidence Act](#), if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. The presumption under [Section 114](#) (g) of the [Evidence Act](#) is only a permissible inference and not a necessary inference. Unlike presumption under [Section 139](#) of Negotiable Instruments Act, where the court has no option but to draw statutory presumption under [Section 114](#) of the Evidence Act. Under [Section 114](#) of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under [Section 114](#) (g) of [Evidence Act](#) depends upon the nature of fact

required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.

38] From the prosecution case on record and from the arguments referred above which are advanced on behalf of the parties, following points arise for my determination and I am recording my findings against those points for the reasons discussed below -

<u>Sr. No.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1]	Whether prosecution has proved that on 20.12.2013 at about 12-30 hours at Sr. No.2, Mother Teresa Nagar, Yerwada, Pune 6, accused committed rape on minor victim girl aged 16 years ?	In the affirmative
2]	Whether prosecution has proved that on the aforesaid day, date, time and place and during the course of same transaction accused committed penetrative sexual assault on victim minor aged 16 years by taking her on the attic of house of accused and penetrated his penis into her vagina ?	In the affirmative
3]	Whether prosecution has proved that on the aforesaid day, date, time and place and during the course of same transaction accused committed sexual harassment to victim aged 16 years by repeatedly following or watching her by saying that she is beautiful and he like her very much with sexual intent ?	In the negative

4] What order ?

Accused is
convicted as
per final
order.

REASONS

AS TO POINTS NO.1 TO 4 :-

39] It is pertinent to note here that the fact that accused committed rape, penetrative sexual assault on minor victim girl aged 16 years, took her on the attic of his house, penetrated his penis into her vagina, are the facts related to each other and those facts are outcome of one and the same incident which allegedly occurred on 20.12.2013 at about 12.30 hours, at S.No. 2, Mother Teresa Nagar, Yerawada, Pune 6. Further all the above facts are related to each other and they are subject matter of points No.1 to 3. As all above facts are subject matter of points No.1 to 3, I find it necessary to discuss reasons for my findings against points No.1 to 3 together. Hence, I am giving my findings to points No. 1 to 3 together.

40] For proving its case prosecution has placed reliance on the documentary evidence, which is referred in the initial part of the judgment. Apart from above documentary evidence prosecution has examined in all 9 witnesses. Out of those witnesses PW-1 is informant victim and injured, PW-2 and PW-5 are the social workers, who helped victim while lodging First Information Report, PW-3 the panch witnesses of seizure panchanama of seizure of clothes of victim, PW-4 is a friend of

victim, who was classmate of victim, PW-6 is headmaster of the school, where victim was studying, PW-7 is a panch of spot panchanama, PW-8 is a expert witness i.e. doctor, who had examined victim, PW-9 is Investigating Officer, who had carried out the investigation in the matter. Out of these 9 witnesses PW-9 is Investigating Officer can be termed as formal witness and the witness having importance to prove procedure carried out at the time of investigation. Out of remaining witnesses PW-1, who is victim herself and PW-7, who is panch of spot panchanama, have not supported the prosecution story. Thus, PW-1, who is a material witness, who had witnessed alleged incident and who is victim of the incident, has not supported the prosecution story and turned hostile so also PW-7 panch of Spot panchanama did not support the prosecution, therefore, learned APP cross examined them at length but nothing fruitful has come on record to support prosecution case. However, PW-2 and PW-5, are social workers, PW-3 panch of seizure panchanama of seizure of clothes of victim, PW-4 who is a classmate of victim, PW-6 is a headmaster of the school of victim, who has proved date of birth, school admission and school leaving certificate of the victim, PW-8 is an expert witness i.e. doctor who had examined victim and opined about penetrative sexual assault on victim, though have supported the prosecution story but none of them are the eye witness to the incident. PW-4 Laxmi Waghmare was a classmate of victim, but she is also not the eye witness, who had witnessed the incident. Their evidence is of hearsay nature. Though doctor has opined about penetrative sexual

assault and proved the medical certificate issued by her, but it does not prove that accused is the author of the incident.

41] PW-1 informant and victim has deposed vide Exh. 6 that she was residing at: Survey No.43, Chandannagar, Kharadi, Pune residing with her mother. She has no brother and father. She has deposed that in 2013-14, she was taking education in 9th standard at Netaji Subhashchandra Bose Vidhalaya, Khadki, Pune, her school timing was from 7 a.m. till 12 noon, she used to go to her school by PMT city bus, upto Gunjan talkies and then used to go to her school by feet she was not knowing the accused present before the court. She further deposed that on 20-12-2013 after closing of her school, she was going to bus stop on feet and as she got thirsty, she stopped near one tea stall for quenching her thirst, There one boy came, he inquired about her name, address and name of school and class, she gave him all the information and he gave her his mobile number on one chit due to which she got annoyed due to his behaviour and she threw it towards him. She further deposed that thereafter that boy started to chase her while she was proceeding towards bus stop, said boy expressed to her that he loved her and he liked her, told his name as Vinod Shantanu Shinde and also asked her to accompany him to his house. She further deposed that she got frightened due to his overtures, he caught hold her hand and took her to his house, which was in the said vicinity, there was nobody in his house, he closed the latch of the door from inside.

42] She further deposed that there were two rooms in his house, ground floor and first floor. There was facility of iron stair case to go to upstairs, he took her to the room situated on first floor, accused removed her clothes and also removed his clothes. She deposed that he told her that he would marry with her and thereafter did physical relations with her against her will, thereafter, she went to her house but as she was in frightened condition and she feared that her mother would angry with her, she kept mum. She further deposed that after about one to two months she informed her friend Laxmi Waghmare about the incident and said Laxmi told this fact to other friends, her friends also inquired from her about the incident. Laxmi Waghmare told this fact to one institute by name India Sponsorship, Yerawada, Pune, where she was doing a course there. PW-1 further has deposed that after few days, one Smt. Mayuri Joshi and Kranti Agnohotri of the said institute had been to her house, they told about the incident to her mother. She has further deposed that on the same day, she along with her mother had been to Yerawada police station, police got her complaint Exh.7 typed on computer and she had gone through it and then put her signature.

43] As PW-1 was not supporting the prosecution APP sought permission and cross examined PW-1 at length. During cross examination by APP PW-1 denied that in December, 2013, the accused used to chase her whenever she was proceeding to her school on feet, he used to express that he liked her and was

asking her to accompany to his house, on one day in December, 2013 prior to 20-12-2013 she had been to tea stall which was by the side of the road to quench her thirst and at that time one boy had approached her and inquired about her name, address etc. She further denied that at that time he had given her one chit with his mobile number and she threw it away by tearing it and when she was proceeding towards bus stop on feet, he followed her and inquired about her name and told his name. She has further denied that she also asked his name and he told his name as Vinod Shantanu Shinde and thereafter the accused used to follow her upto bus stop from school and used to express that he liked her and she was beautiful. She further denied that she was not paying any heed to his remarks and even then he used to follow her and used to ask her to accompany to the house. She has deposed that portion marked 'A' to that effect from her complaint is not correct and she was unable to assign any reason why it is so mentioned by the police. She identified the accused who was present before the court.

44] During cross-examination conducted for accused PW-1 has admitted that her mother is Hindu by birth and her father is Muslim, her father is no more and she was unable to tell in which year her parents were married. She has deposed that she has no brother and sister, she took education for one year at Netaji Vidyalaya, Khadki, in the said school, there is education from 8th to 10th standard and prior to that she was taking education in a school at Ganeshnagar by name Anusaya but she

does not remember its full name. She has further deposed that previously she was residing at Yashwantnagar at Yerawada. She has admitted that as it was a rented home and as the relations with neighbours were cordial, they have to leave that house, the matter reached upto the police station, at that time and matter was settled. She further admitted that in the said matter, allegations were of similar kind and accused in that matter had given her in writing. She further admitted that the said accused had given in writing that he would not contact her and did not keep relations with her in future and, therefore, he was allowed to go. She has admitted that due to such matter, her father came in tension and died and thereafter they had to shift to other place, i.e. Kharadi, Chandannagar.

45] PW-1 further deposed that Laxmi Waghmare was her close friend in Netaji school, Alpiya was her another friend in the school. She has admitted that these two girls were being her close friends, she used to tell all her things to them and vice versa and there was talk between her and these two friends regarding condom and contraceptive pills so also there was talk between them regarding boy friend and girl friend. She further admitted that these two friends were having boy friends and they used to tell about their boy friends to her frequently. She further admitted that she had no boy friend after the first incident as narrated above. She has denied that considering the discussion with friends, she was desiring to have boy friend. She has admitted that after coming out of her school, there is

road towards Gunjan talkies on right side and on left side there is Golf square, the said school can be approached by two ways, i.e. by city bus from Chandannagar by which one has to alight at Golf square and another way is from Nagar road, for that purpose, one has to alight at Gunjan talkies.

46] She further admitted that she used to come to her school either of these ways, she is well conversant with the locality of the school, the school is situated in thickly populated area, having houses abutting to each other and there is always 24 hours traffic of vehicles and people, on the said road, there are number of signals with police personnel doing duty at various places on the said road. She has deposed that she had been to the police station on 11-2-2014 that time Mayuri Joshi and Kranti Agnihotri had met her on that day in the evening. She has admitted that her mother was present in the house when they had come, they were in her house for one hour, thereafter, they went to police station, PSI Shahare had got angry with her at the police station. She has admitted that she expressed to her that false allegations should not be made against anybody, like that of earlier, the members of the said Sanstha were adamant enough to register the offence irrespective of veracity of the complaint, accordingly her complaint was recorded as per narration of the lady member of the Sanstha. She has admitted that she came to know that a person by name Vinod was married, having a child and, therefore, she got angry with him and she felt that she could not

marry with him, therefore, she had decided to file a case against him and with the help of Laxmi Gaikwad and lady members of sanstha, she filed the complaint.

47] She has denied that nobody had caught hold her hand and dragged her with him. She has admitted that police had demanded her birth certificate or any other document relating to her birth, but it could not be provided as she was not having it. She has admitted that she does not know in which hospital and where she was born and in which year she was born, on the day of lodging the report, she was referred to Sassoon Hospital for medical examination and the doctor before her examination, interrogated her about the history and it was written as per her narration. She has deposed that she knows a person by name Vishesh. She has admitted that she told about him to the doctor. She has denied that she knows persons by name Nitin Shrirang Falke and Danial Ramesh Falke, she was asking about the details of the accused by visiting the houses of these two persons, she was having one sided love affair with the accused. She has further denied that accused had informed her that he was already married, having a child and, therefore, there could be no relation with her. She has further denied that she is of 20 years at present, the accused had not done any physical relations with her, she has filed false case against the accused, with the help of members of the Sanstha and she is deposing false.

48] PW-2 Mayuri Madan Joshi, a social worker, has deposed vide Exh.21 that previously in the year 2013-2014, she was working as education Coordinator of India's Sponsorship Committee, at present, she is attached to Rainbow Foundation India, Model colony, Pune. She has further deposed that she knows one Laxmi Waghmare as she was student of India's Sponsorship Committee and she also know the victim girl, as the said victim and Laxmi Waghmare were taking education from one and same school i.e. Netaji Subhashchandra Bose High-School, Yerawada. She has deposed that they give awareness to children as to how to avoid sexual abuses, their rights etc. She has deposed that Laxmi Waghmare disclosed her that some sexual offence has been committed with victim, thereafter, they called victim in their Institute to confirm the said information and after discussion with victim, they approached her parents that time, her colleague Kranti Agnihotri was with her.

49] PW-2 has deposed that that time victim told the incident to her parents also, thereafter, herself, her colleague Kranti Agnihotri, victim and her mother went to police station and victim lodged the complaint. She further deposed that in the year 2013, she was working in India Sponsorship Committee, Yerawada, she has worked many times as a Social Worker and helped victims in POCSO and Child Rights Act cases. She has deposed that she knows Social Worker - Kranti Dabir/Agnihotri, since 2-3 years prior to the incident.

50] She has admitted that Netaji Subhashchandra Bose High School and India Sponsorship Committee are two different Institutes and she had visited the house of Laxmi Waghmare once, friend of victim girl and she received information regarding incident from Laxmi in the end of December, 2013. She has further deposed that after one month, she informed this incident to police before Feb.2014, police reduced into writing F.I.R. lodged by mother of victim girl, in Jan.2014 and her statement was also recorded by police on the date of lodging of F.I.R. She does not remember whether she had again visited police station in respect of this case. She has denied that whatever she had heard from Laxmi Waghmare, same was narrated to police. She has deposed that before lodging F.I.R., she made counseling with victim girl and her parents, she guided parents of victim get where and how to lodge FIR. She has denied that FLR. was lodged as per instructions and guidance given by her, she has deposed false that received information of the incident from Laxmi Waghmare, victim girl did not disclose incident to her, she is deposing false that in January 2014, incident was disclosed to police and she further denied that whatever she has stated in examination in chief is falsely stated.

51] PW-3 Sau. Leelabai Kailyya Swamy has deposed at Exh.45 that on 12th February 2014 police had called her to Shastrinagar police station. That time another panch Salve and one police officer were present. Said police officer seized the

clothes i.e. knicker, kurta and salvar under panchanama. Said panchanama was read over to PW-3 after it was written and thereafter, her signature was obtained on said panchanama. PW-3 has further deposed that said panchanama is at Exh.46 and she has identified clothes article 2, 3 and 4 i.e. Salvar, Kurta and knicker respectively.

52] In her cross-examination PW-3 has deposed that she does not know another panch Salve and she had no occasion to meet or talk with Salve. Police made her phone call and called for panchanama because previously also she had helped the police for panchanama. She has deposed that whenever police used to call her she used to go to police station and as deposed by her when she went to police station the clothes were on the table from police station. She does not know that who had brought those clothes. She has further deposed that when she went to police station panchanama was already prepared and she had only signed it. She has volunteered that she is illiterate however, she has denied that at the instance of police she has deposed false.

53] PW-4 Laxmi Uttam Waghmare has deposed at Exh.47 that she is married in January 2021 and at present her name is Laxmi Sagar Kamble. She had obtained education from 7th to 10th standard at Netaji Subhash Chandrabose Vidyalaya. She used to go to the school by walk. Her school timings were 7 am to 12.30 p.m.

54] She has further deposed that she knows victim from this case as herself and victim were learning in same class and same school. Victim had told PW-3 that accused gave her a chit of his name and phone number and accused had told victim that he was in love with victim but said proposal was rejected by victim. It is also deposed by PW-4 that victim had further told her that on next day while victim was going by the road, accused came across her, forcibly caught hold her hand and took victim to his house at fish market. Victim had also told PW-4 that at that time there was no one at the house of accused and accused had carried victim to the room from upper floor and in said room accused had committed forcible sexual intercourse with victim.

55] PW-4 has deposed that thereafter, she had informed the incident with victim to the social workers from the institute namely India's Sponsorship Committee and thereafter, those social workers had asked PW-4 to bring the victim to said institute. As deposed by PW-4 her statement was recorded by police on 05.03.2014 and that time social worker Mayuri Joshi was present.

56] PW-4 has deposed in her cross-examination that while she was taking education, besides victim one girl namely Isha was also friend of PW-4. At that time one more girl namely Alpia was also in their class but Alpia was not in their group. At that time PW-4 and victim were not using mobile phone because

their school had not permitted for it. As deposed by PW-4 she used to reside at Yerwada and victim used to reside at Chandannagar bypass. There was distance of 5 to 6 kms in their houses. After school they used to go to different sides, however, while they used to be in school, they used to share with each other. At that time they were not having boy friends, hence, they did not discuss about boy friends. Alpia was having boy friend but PW-4 and victim were not having boy friends.

57] It is denied by PW-4 that she came to know from discussion with victim that victim was in search of a boy friend and PW-4 had no occasion to see the boy about whom victim had told in respect of alleged incident. She has deposed that she was knowing Mayuri Joshi since prior to the incident and she used to accompany Mayuri Joshi to many places for work. After victim had narrated the incident PW-4 had informed the said incident to Mayuri Joshi but at that time victim was not with PW-4. She has admitted that Mayuri Joshi being social worker had helped police from time to time.

58] As deposed by PW-4 the complaint from this case may have been filed with police after 4 to 5 months of informing the incident with victim by PW-4 to Mayuri Joshi. She has denied that Mayuri Joshi prior to going to police station had discussed with PW-4 and victim about what should be state before police. As deposed by PW-4 she had accompanied victim and Mayuri Joshi to police station. She has denied that police

had recorded her statement as narrated by Mayuri Joshi. She has deposed that till filing the report with police PW-4 had not narrated the incident with victim to anyone. She has further deposed that after leaving school she had no contact with Alpia. She came to know that on 11.02.2014 victim had lodged the report with police but thereafter, she had no occasion to visit victim. She came to know from Mayuri Joshi about filing of the complaint by victim.

59] PW-4 has denied that Mayuri Joshi had informed PW-4 that what was mentioned by victim in the complaint filed before police. In March 2014 there was 10th standard examination of PW-4 and in examination period PW-4 used to meet victim as their examination center was in same school. However, in said examination period PW-4 and victim had no much talks. She does not remember that prior to the 10th standard examination she had gone to police station for giving the statement. However, she has deposed that when her statement was recorded, victim and Mayuri Joshi were present. On that day PW-4 had no discussion with victim. However, her statement was recorded by police with the help of Mayuri Joshi. That time her parents were not present in police station and till giving the statement before police she had not narrated the incident to her parents and her intention was that her school friends were together.

60] PW-4 has further deposed that she does not

remember that there were 53 students taking education in her class. She has denied that after she had informed the incident with victim to Mayuri Joshi, she was asked by Mayuri Joshi to bring victim in the institute. Said fact was stated by her before police but she is unable to depose that why police has not mentioned said fact in her statement. She has denied that victim was having one sided love affair and said boy was liked by victim. She has also denied that with the help of Mayuri Joshi she had made victim to file incorrect report with police. She has denied that whenever PW-4 and victim used to discuss they used to discuss about condoms and contraceptive pills. She has denied that accused was boy friend of victim therefore, PW-4 had not narrated the incident to her family member. She has denied that at the instance of Mayuri Joshi she has deposed false against accused.

61] PW-5 Kranti Agnihotri Dabir has deposed at Exh.48 that she is working as free lancer social worker. She has obtained the degree of Master in Social Work and previously she used to work for the institute namely Alochana and Masoom as those institutes were working for preventing sexual offences against children. In January 2014 help was sought through Mayuri Joshi from Indian Sponsorship Committee and that time Mayuri Joshi had told PW-5 that the girl namely Laxmi who used to come to Mayuri Joshi had informed about the sexual harassment with her friend and hence, said friend victim of this case needs the help. PW-5 has deposed that therefore, PW-5 had

phone talks with Laxmi and thereafter, on 11.02.2014 Laxmi, Mayuri Joshi, PW-5 and victim had discussion together.

62] As deposed by PW-5 at the time of said discussion victim told that on 20.12.2013 one boy forcibly dragged victim and said boy had forcible sexual intercourse with victim. As deposed by PW-5 at that time victim was very much frightened and victim was unable to understand that what should be done. She has deposed that whenever the information about the offence under POCSO Act is known to the institute it is the responsibility of the institute to inform such offence to police. Victim had not narrated the incident to her parents as victim was afraid of the fact that her mother will assault her or her mother will held responsible her for the incident.

63] PW-5 has deposed that thereafter, Mayuri Joshi and victim went to meet victim's mother at her house at Chandannagar. They had narrated the incident to victim's mother, consoled victim's mother and told her about provisions of POCSO Act and convinced her that it was necessary to inform the incident to police. They had given guidance to victim's mother for lodging the report with police and they had made contact with Yerwada police station and called the police at Indian Sponsorship Committee for recording statement victim. Thereafter, police came to that institute and recorded statement of victim. Thereafter, PW-5 and Mayuri Joshi made counseling of victim, got her medically examined and gave her moral support.

As deposed by PW-5 police had recorded her statement.

64] PW-5 has deposed in cross-examination that the institute with which PW-5 works is different than India Sponsorship Committee institute. She had read her statement recorded by police and it is correctly recorded as narrated by her. She has admitted that in December 2013 Mayuri Joshi had made contact with PW-5 in respect of incident from this case, however, some time was required for their actual meeting. That time Mayuri Joshi had told PW-5 that sexual harassment of the girl was made and thereafter, PW-5 had desire to meet victim. Mayuri Joshi was in contact with victim and the time was required for morally supporting the victim.

65] PW-5 has deposed that in January 2014 after Mayuri Joshi had sought help, PW-5 and Mayuri Joshi did not meet immediately. However, in between December 2013 to February 2014, herself and Mayuri Joshi were in contact continuously. That period PW-5 felt that it was necessary to report the incident to police immediately. PW-5 has denied that the reason behind not going to police was that victim was not ready to give the statement as instructed by PW-5 and Mayuri Joshi. In between December 2013 to 11.02.2014 PW-5 never met victim and they had no phone talks because Mayuri Joshi had told PW-5 that victim was not in a condition to speak. In between December 2013 to February 2014 she had not tried to inform the incident to the parents of victim. On 11th February 2014 herself, victim

Mayuri Joshi and Laxmi met at Indian Sponsorship Committee in afternoon victim had come to said institute after the school. That time they had discussion for about 1 and ½ hour. Thereafter, they had been to the mother of victim and till late afternoon they were with the mother of victim and that time they had narrated the incident to the mother of victim. PW-5 deposed that father of victim is not alive. While answering the question that whether discussion had taken place with the mother of victim that what complaint should be filed with the police, PW-5 deposed that she had informed victim's mother about the provisions of POCSO Act and she had convinced the victim's mother that complaint was necessary to be filed with police. She has further deposed that at that time no discussion had taken place about the fact that what should be stated by victim and Laxmi before police.

66] PW-5 has deposed that she does not remember that after discussion with the mother of victim, they went to police station, however, she deposed that in between 7.00 p.m. to 7.30 p.m. they went to police station and that time PW-5, victim, Mayuri Joshi and Laxmi had gone to police station. PW-5 had again deposed that it was informed to police by phone that they should come to Indian Sponsorship Committee for recording statement of victim and after statement of victim was recorded they had gone to police station. She has admitted that portion marked 'A' from her statement is correct. She has further deposed that after they went to police station the complaint was

recorded and statements of all of them four were recorded and thereafter, she had no occasion to go to police station.

67] PW-5 has deposed that portion marked 'A' from her examination in chief is not appearing in her before police. She has admitted that in her statement before police it is not mentioned that said boy dragged victim and she has further denied that herself and Mayuri Joshi had given guidance to victim for 2 months in respect of as to how the report should be lodge with the police. She has denied that for two months report was not lodged with police, they were threatened by police that crime will be registered against them, hence, they had lodged report with police. PW-5 deposed that victim at the time of discussion had not told that previously also victim had filed same complaint against one more boy. Lastly PW-5 has denied that she has deposed false against accused.

68] PW- 6 Bhanudas Pandurang Khandve has deposed vide Exh.52 that he is in-charge head master of Anusayabai Sawant Vidyalaya, Municipal Corporation school 143, Ganeshnagar, Yerawada, Pune, even though said school is called as 'Boys school, admission is also given to girls in said school. He has deposed that as per the record of his school, victim was admitted in 5th std. in his school on 26.06.2009 and that time school leaving certificate issued by Municipal Corporation school No. 72 (Girls) was accepted for giving admission to said student in his school. He has further deposed that entry about the name

of said student was noted down in the General register No.1 of his school at Sr. No. 1706 and as he has brought copy of said original General register No.1 with him and he has filed attested copy of page Exh.53 from said register upon which entry No. 1706 is noted down, which is verified by the Superintendent of the Court. He has further deposed that as per Exh.53 date of birth of said student is 27.12.1997 and said student has left his school after passing 7th std. examination and school leaving certificate Exh.54 to that effect was given by his school to said student. He has deposed that Exh 54 was prepared on the basis of information from entry No. 1706 of Exh. 53.

69] During cross-examination for accused he has admitted that in Municipal Corporation school Nos. 72 & 143 percentage of Mohammedan students was high, since last 10 days he is in-charge headmaster of his school as headmistress of his school is on leave. He has deposed that he is serving in school No. 143 since 2015 and in the year 2009, he was not serving in said school, hence, he has no personal knowledge about the fact that entry No.1706 from General register is noted down by which person. He has deposed that he does not know that so many students having same name get admissions in the school, he had no occasion to meet victim, he has never served in Netaji Subhashchandra Bose school, hence he does not know the victim girl. He has admitted that whenever admission is given to the student for first time in the school, it is necessary to verify his date of birth from his birth certificate but denied that

the documents Exh. 53 & 54 produced by him are false.

70] PW-7 Daniel Ramesh Landge has deposed vide Exh.55 that on 11.02.2014 he had not gone to any spot. He has denied that on that day police had called him at Mother Teresa nagar, survey no. 2, fish market, Yerawada, Pune. During cross-examination by APP he has admitted that he is residing in Mother Teresa nagar, Yerawada. He has further deposed that he is a social worker, his wife is Municipal Corporator of Yerawada Ward. He has denied that he was called by police on above spot of incident and that time another panch Sandip Chavan, police and one girl were with him. He has denied that said girl had shown the spot of incident in his presence and panchanama about said spot of incident i.e. one room from first floor was prepared in his presence. He has denied that Savita Shinde the owner of said room had told in his presence that accused Vinod Shinde was residing in said room with his mother. He has denied that panchanama of said room was prepared by police in his presence. He has denied that as accused resides in his vicinity and he works for him, he has deposed false against prosecution.

71] PW-8 Sakshi Abhinav Zawar ne-(Sakshi Mundada) has deposed vide Exh.57 that she is having master degree in surgery along with obstetric and gynecologist. She has deposed that on 12.02.2014 she was working as resident doctor at Sassoon Hospital, Pune and on that day at 5.00 a.m. in the morning patient namely Rizwana Mehamood Shaikh was

brought by lady police constable buckle No. 7163 to Sassoon Hospital for the purpose of medical examination. She has deposed that prior to medical examination of said patient consent of her guardian Naseem Shaikh was obtained by her and thumb impression of victim was also obtained by her. At the time of medical examination said patient narrated the history of penetrative sexual assault with her in Hindi stating that her age was 16 years and she was studying in 9th standard at Netaji Subhash Chandra Bose School, Yerawada, in December 2013.

72] She has deposed that victim further stated that accused Shinde started following her from her school to bus stand, accused used to say her that she was beautiful hence, he liked her. Victim had further stated that on 20.12.2013 when she was going to bus stand Vishesh, the friend of accused came to her and asked her to come to the house of accused but she refused to go with said friend, thereafter, accused came and forcibly took her to his house. Victim had further told that door of the house of accused was locked from outside by the friend of accused, thereafter, accused took her in bed-room said that she was beautiful, he likes her, and wants to kiss her but she refused and opposed, however, accused forcibly kissed her, removed his pant, removed undergarments of victim and even though she was opposing, accused had forcible sexual intercourse with her. PW-8 has further deposed that at the time of examination of the victim, she had noted down her identification mark as black mole on left side of the neck and one black mole in the middle

of left eyebrow and at the time of medical examination general condition of the patient was good. At the time of examination it was further noticed by PW-8 that the patient was not having any injury, further she was not having injury on her external genitals, her hymen had old multiple healed tears, the perineum was intact, cervix was healthy and examination could be done with small sized cusco's speculum, there was no bleeding from vagina, there is no mating of pubic hair. As per the history narrated by the patient and as per her clinical examination she opined that the patient had penetrative vaginal sexual intercourse. Sample of vaginal swab was collected, sealed and handed over to lady police constable on duty. PW-8 has further deposed that after medical examination of said patient she had prepared the medical report Exh.58 in her own handwriting.

73] During cross-examination PW-8 has deposed that she does follow the book of Medical Jurisprudence of Dr. Modi and follow the guidelines given thereunder. She also follow the guidelines issued by Ministry of Health and Family Welfare. She has admitted that as per guidelines of Ministry of Health and Family Welfare medical officer has to verify the age of victim by perusing necessary documents. As the victim was referred to her only for gynecology examination she had not verified such documents because age determination factor is related to forensic department. She has admitted that there are number of reasons for hymenal tears like cycling, racing and masturbation. She has deposed that it is not necessary that medical officer

should opined about 9 o'clock injury as per medical examination guidelines. The guidelines of Ministry of Health and Family Welfare dated 10.12.2015 are not applicable to present case because victim from this case was examined by her in the year 2014.

74] She has admitted that at the time of medical examination of victim she has used cusco's Speculum and if that Speculum is not properly used properly the injuries are possible. She has admitted that opinion about penetrative sexual assault with victim was given provisionally on the basis of history narrated by victim and on the basis of her medical examination and forensic lab report has importance for final opinion in that regard. She has deposed that Forensic lab report is not perused by her, if ultra songraphy is done vaginally then rupture of hymen is possible, however, generally vaginal ultra sonography is not made. She has admitted that, as there were old healed injuries, she was unable to depose exactly that whether the hymen rupture was due to penetration or due to any other reason. She has admitted that victim was referred to her by police with the covering letter and in said letter information about victim was given by police. She has further deposed that there can be two opinions about penetration i.e. penile penetration and non penile penetration.

75] She has admitted that, when the consent of victim for medical examination is obtained, as per above guidelines,

presence of police personnel is not expected. She has denied that constable Saraswati Kagane was present while PW-8 was examining the victim. PW-8 further denied that the history mentioned in Exh.58 is the history which was mentioned by police in the covering letter sent with victim. She does not know that as per guidelines of Hon'ble Apex Court of April 2013, two finger test is banned. She has denied that, opinion given by her in Exh.58 is incorrect opinion as it is given without perusing FSL Report. She has admitted that, while narrating the history victim had stated the name of Vinod Shinde.

76] PW-9 Investigating Officer Rekha Shamrao Shahare has deposed vide Exh.62 that in February 2014 she was serving as PSI at Yerwada Police Station, Pune and on 11.02.2014 Kranti Anant Agnihotri Dabir had visited Yerwada police station along with victim. She has recorded the complaint Exh.7 shown to her through VC was narrated by victim to her. She has deposed that portion marked 'A' Exh.63 from the complaint Exh.7 shown to her was stated by victim before her and contents of said portion are correct as narrated by victim. She has deposed that on 11.02.2014 she has also recorded statements of witnesses - PW-5 Kranti Agnihotri, Naseem Maheboob Shaikh and Mayuri Joshi as narrated by those witnesses. After accepting complaint Exh.7 she submitted her report Exh.64 before Sr. PI for registration of the crime on the basis of complaint filed by victim. She has further deposed that on the basis of complaint Exh.7 and her report Exh.64 crime No. 65/2014 for the offences

punishable under Section 376 of IPC along with Section 3,4, 11(4) and 12 of POCSO Act came to be registered with Yerwada police station and its investigation was handed over to her.

77] PW-9 has further deposed that on 11.02.2014 she has visited the spot of incident and prepared the spot panchanama Exh.65 shown to her through VC in presence of panchas. She has also prepared sketch map attached with Spot panchanama was drawn by her, which is part and parcel of Exh.65. She has further deposed that on 12.02.2014 she had referred victim to Sassoon Hospital Pune and got the victim medically examined. She has further deposed that on 12.02.2014 vide seizure panchanama Exh.46 shown to her by VC, she seized clothes of victim. She has further deposed that on 12.02.2014 PSI Nandekar had arrested accused Vinayak Shinde and PSI Nandekar had seized underwear of accused under arrest and personal search panchanama Exh.66 shown to her by VC. She has further deposed that on 14.02.2014 vide letter Exh.67 she requested Head Master of Netaji Subhash Chandra Bose High School Yerwada, Pune for providing her age certificate/ bona-fide certificate of victim and in response to letter Exh.67 Head master of Netaji Subhash Chandra Bose school had provided her the birth certificate of victim Exh.68. She has further deposed that on 16.02.2014 she has recorded statements of witnesses Nitin Phalke and Danial Landage as stated by those witnesses.

78] She has further deposed that on 21.02.2014 along with letter Exh.69 she had sent the seized muddemal from this case with constable Amit Jadhav to forensic lab for chemical analysis. She has deposed that on 05.03.2014 she had recorded statement of Laxmi Uttam Waghmare, the friend of victim as stated by said witness, on 02.04.2014 she had submitted report Exh.70 before CJM Pune and requested said authority to make arrangement for recording statement of victim under Section 164 of Cr.P.C. She has deposed that on 05.04.2014 she had produced victim before JMFC Court No.9, Pune and got recorded statement of victim under Section 164 of Cr.P.C., on 15.05.2014 she had recorded statement of witness Janardan Tonde as stated by said witness and thereafter, she has recorded statement of witness Amit Suresh Jadhav. She has further deposed that during investigation she received the reports of chemical analysis from Forensic Lab Exh.71, 72 and 73 and as in investigation it was revealed that accused had committed alleged offence and strong evidence against him was available, he has submitted charge-sheet against accused in court.

79] During cross-examination for accused PW-9 has deposed that the statements of all the witnesses from this case are recorded by her, in between December 2013 to 10.02.2014 Kranti Dabir and Mayuri Joshi had not informed the incident to her or to her police station. She has further deposed that on 11.02.2014 she had not enquired with witness Laxmi Waghmare. She has denied that at once she had enquired with

victim, Kranti Dabir Mayuri Joshi and Laxmi Waghmare. On 11.02.2014 she had not called Laxmi Waghmare for enquiry. She does not remember that whether at the time of recording of statement of Laxmi Waghmare, victim and Mayuri Joshi were accompanying Laxmi Waghmare. She has further deposed that the case diary in respect of the investigation from this case was maintained by her and it is submitted to Yerwada police station. As she was transferred she was unable to remain present before the court with said diary.

80] She has further deposed that she had not enquired with the headmaster of Netaji Subhash Chandra Bose school that how many girls having name Rizwana were studying in same school. She has admitted that after perusing all the papers of investigation from this case she has submitted charge-sheet in the court. It was not noticed by her that in medical papers of victim the boy namely 'Vishesh' was referred. The history narrated by victim before medical officer, which was mentioned in the medical report of victim was perused by her. On perusing the case history from medical report of victim she say that the word 'Vishesh' mentioned in said report is not the name of the boy. She has deposed that she can read and understand English. She has not enquired with neighbours of accused in respect of the person namely 'Vishesh'. She has not enquired with family members of accused about the name of brother of accused. She has denied that portion marked 'A' from Exh-7 was not stated by PW-1 i.e. the victim before her. She has not enquired with the

neighbours of accused about the fact that whether or not at the time of incident victim had been to the house of accused. In this case she has recorded statement of victim by going to the house of victim. For that purpose she had carried laptop and printer to the house of victim. She has admitted that Exh.7 was typed in police station and prior to recording of Exh.7 she had no occasion to meet Mayuri Joshi and Kranti Agnihotri. She has admitted that at the time of lodging report Exh.7 Mayuri Joshi and Kranti Agnihotri had brought victim to police station. She has denied that victim was not willing to lodge report therefore, both of them had come with victim to police station.

81] She has deposed that no chit was seized by her in this case but volunteered that the chit on which victim had written her mobile phone was torn out hence, she had not seized said chit. She had not recorded supplementary statement of victim to show that said chit was torn. CDR of the mobile phone of victim and accused from this case were not obtained by her. She has not obtained birth certificate of victim. She has not enquired with primary school of victim about her date of birth. There was no pressure upon her for not making such enquiry. She has denied that at the time of incident age of victim was more than 18 years inspite of it she has implicated accused in false case. She has denied that she has intentionally suppressed the birth certificate of victim and the documents of the hospital in which birth of victim had occurred, in investigation of this case it was revealed that previously also victim had made

complaint against one boy and later-on she had withdrawn said complaint.

82] She has admitted that in investigation it was revealed that Mayuri Joshi and Kranti Agnihotri were knowing since December 2013 about sexual assault with victim. She has enquired with Mayuri Joshi and Kranti Agnihotri as to why till 11.02.2014 they had not brought victim to police station that time she came to know that victim was frightened hence, she could not be brought to police station. She has admitted that if someone suppresses the fact of sexual assault with child, crime can be registered against the person suppressing such information. She has denied that in between December 2013 to 11.02.2014 Mayuri Joshi and Kranti Agnihotri have suppressed from police the fact of sexual assault with victim, even though for two months Mayuri Joshi and Kranti Agnihotri have suppressed said information, she has intentionally not registered offence against them, in January 2011 Mayuri Joshi, Kranti Agnihotri and mother of victim had come to police station for lodging complaint.

83] She has further denied that due to the pressure of Mayuri Joshi and Kranti Agnihotri, she has lodged false complaint against accused. She has admitted that at the time of recording of statement of PW-4 Laxmi Waghmare under Section 161 of Cr.P.C. victim, Mayuri Joshi and Kranti Agnihotri were accompanying said witness. She has not recorded supplementary

statement of those three ladies about the fact that they were accompanying Laxmi Waghmare when her statement was recorded by her. She has deposed that in this case she had not made enquiry with the person namely Vinod Shinde. She has denied that even though accused from this case has no concern with this case she has arrested him in false case, on the basis of incorrect complaint she has conducted false investigation and she has filed false charge-sheet. She has admitted that the person namely Vinod Shinde was not arrested by her in this case.

84] From above referred evidence it becomes clear that prosecution has proved the fact that date of birth of victim from this case is 27.12.1997. Said fact is proved by prosecution by filing on record documentary evidence like copy of general register maintained by Anusayabai Sawant Primary School i.e. Municipal school No.143, Ganeshnagar Yerwada, Pune. Further copy of school leaving certificate of victim, which is at Exh.54, is also proved by prosecution through PW-6. There is no reason to disbelieve evidence of PW-6 and there is no reason to disbelieve Exh.53 and Exh.54. It is pertinent to note here that prosecution has also filed birth certificate cum bona-fide certificate of victim which is filed at Exh.68 and said birth certificate cum bona-fide certificate of victim shows that on 17.02.2014 victim was taking education in 9th C standard from Netaji Subhashchandra Bose Yerwada, Pune and her date of birth is shown in Exh.53, 54 and 68 as 27.12.1997. Those documents are necessary to be

accepted as legal evidence of the date of birth of victim because in the light of observations of Hon'ble Supreme Court in the case between **P. Yuvaprakash vs. State** which is cited by the defence itself, it becomes clear that in case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or Board as the case may be, shall undertake the process of age determination by seeking evidence by obtaining the date of birth certificate from school, or the matriculation or equivalent certificate from concerned examination Board, if available, and in absence thereof, the birth certificate given by a Corporation or a Municipal authority or a panchayat and only in absence of above certificates age shall be determined by the ossification test or any other latest medical age determination test conducted on the orders of the Committee or Board.

85] From above discussion it becomes clear that prosecution has proved the fact that date of birth of victim is 27.12.1997 and the incident of sexual harassment with victim had occurred as per the evidence on record on 20.12.2013 because PW-1, who is victim from this case, has deposed about the fact that on 20.12.2013 accused had carried victim to his house, which is situated at fish market, Yerwada, Pune and accused had committed forcible sexual intercourse with victim in the room from the upper floor from said house. There is corroborative evidence of PW-2, 4 and 5 to show that victim had told the incident to PW-4 Laxmi Waghmare, who had informed

said incident to PW-2 Mayuri Joshi and PW-5 Kranti Agnihotri Dabir. Defence has contended that PW-2, 4 and 5 had made victim to lodge report Exh.7 with police even though victim was not ready to file said report with police. I am unable to accept said defence mainly because there is nothing on record to show that PW-2, 4 and 5 had any grudge or enmity against accused.

86] Further even though it is suggested on behalf of defence that the report Exh.7 was lodged at the instance of PW-2 and 5 and as told by them to victim, said fact is denied by PW-2, 4 and 5. Thus, mere suggestion on the part of accused that PW-2, 4 and 5 have implicated accused in false case, cannot be accepted because there must be some reason for PW-2, 4 and 5 to implicate accused in false case. I have already pointed out that there is nothing on record to show that those witnesses have any grudge against accused or they had enmity with accused. In such circumstances I find that merely because PW-2 and 5 have helped the victim in lodging the report with police and merely because they have given moral courage to victim to lodge the report with police, their evidence cannot become unbelievable. Further victim had also narrated the incident of 20.12.2013 to PW-8 medical officer Sakshi Zanwar and therefore, PW-8 had mentioned said incident in the history of sexual assault with victim, which is appearing at Exh.58. From oral evidence of PW-8 Dr. Sakshi Zanwar and from Exh.58 it becomes clear that victim had suffered from penetrative vaginal sexual intercourse. Thus, alleged incident of sexual harassment

of victim from the evidence on record has occurred on 20.12.2013 and as the date of birth of victim is 27.12.1997, victim's age as on 20.12.2013 was 15 years, 11 months 23 days and as such it becomes clear that as on 20.12.2013 victim's age was below 16 years. Thus, prosecution has proved the fact that age of victim as on 20.12.2013 was below 16 years.

87] It is pertinent to note here that while deposing before the court victim has stated her age as 17 years as on 07.09.2015 and from careful perusal of victim's deposition it is noticed that victim has not deposed her exact date of birth but defence specifically has not denied the fact that as on the date of alleged incident i.e. on 20.12.2013 victim's age was below 16 years or as on the 07.09.2015 victim was not of 17 years. It is pertinent to note here that defence has suggested to the victim on 07.09.2015 that she was of 20 years at that time, however, said suggestion is denied by victim. It is pertinent to note here that in the charge frame by the court it is mentioned that as on the date of incident i.e. on 20.12.2013 victim was of the aged of 16 years.

88] Further victim has deposed before the court on 07.09.2015. Thus, it was for defence to at least cross examine victim on the point of her age at the time of the incident i.e. her age as on 20.12.2013. However, defence has not cross-examined victim on the point of her age as on 20.12.2013. Hence, in the light of observations of Hon'ble Bombay High

Court in the case between **Kundan Pendor vs State** i.e. the judgment of Hon'ble Bombay High Court passed in Cr. Appeal 313/2014 passed on 21.10.2016 it becomes clear that when prosecutrix is not cross examined about her date of birth, claim of prosecutrix has to be accepted. Thus, it becomes clear that victim, who is prosecutrix from this case, has claimed that on 07.09.2015 she was of 17 years hence, on 07.09.2013 she is necessary to be considered of the age of 15 years and I have already observed that from the documents on record the date of birth of victim is 27.12.1997 and her age as on the date of incident i.e. on 20.12.2013 her age was 15 years 11 months and 23 days. Thus, on the basis of the documents on record and on the basis of oral evidence on record it becomes clear that prosecution has proved the fact that age of victim as on 20.12.2013 was below 16 years, hence, victim/ prosecutrix is necessary to be considered as the child as per the provisions of POCSO Act and therefore, provisions of POCSO Act including Section 29 and 30 of POCSO Act become applicable against accused from this case.

89] Now it becomes necessary for the court to find out from the evidence on record that whether prosecution has proved the fact that on 20.12.2013 accused had committed forcible sexual intercourse with victim. I have already referred the evidence of victim in detail. On careful perusal of said evidence it is noticed that victim has not deposed before the court about the portion Exh.63, which is marked as portion 'A'

from Exh.7, however, victim in her clear unequivocal words has deposed about the incident of 20.12.2013.

90] She has deposed that on 20.12.2013 after her school when she was going to bus stop, she became thirsty, hence, she stopped near one tea stall for quenching her thirst. That time one boy came and enquired her name and address etc and she gave said information to said boy. Thereupon said boy gave her his mobile number written on one chit but she got annoyed due to behaviour of said boy and she threw said chit towards said boy. Thereafter, said boy chased her and said boy told his name as Vinod Shantanu Shinde, he had asked her to accompany him to his house. She got frightened due to his behaviour, however, said boy caught hold her hand, took her to his house, which was in the said vicinity. Not only it, victim has further deposed that there was nobody in said house, there were two rooms in said house, one on ground floor and another on first floor, said boy took her to the room situated on first floor, removed her clothes and by removing his clothes, had physical relations with her against her will saying that he will marry her. Thus, from the facts deposed by victim prosecutrix in her examination in chief it becomes clear that victim has exactly deposed the facts which are like the facts mentioned in paragraph 4 of Exh.7.

91] On careful perusal of evidence of victim prosecutrix it is noticed that the then learned prosecutor has cross examined prosecutrix merely because portion marked 'A' (Exh.63) was not

deposed by victim at the time of her examination in chief. However, the facts from Exh.63 are related to the previous conduct of accused and those facts are not related to the real incident which occurred on 20.12.2013, hence, I was unable to understand as to why the then learned prosecutor could have decided to cross examine victim prosecutrix even though victim has deposed about the incident dated 20.12.2013 in clear words. Further on careful perusal of cross-examination of victim, which is made by defence it is noticed that defence has suggested victim that accused had not caught hold her hand and had not dragged her to his house however, said suggestion is denied by victim prosecutrix.

92] On careful scrutiny of evidence of victim prosecutrix it is noticed that defence even has not suggested victim prosecutrix about alleged incident of forcible sexual intercourse allegedly made by accused with victim prosecutrix. It is even not suggested that accused had not carried victim to his home and accused had not committed alleged act by removing victim's clothes or his clothes. Thus, the evidence of victim prosecutrix about actual forcible sexual intercourse by accused with her, remained un rebutted. What is suggested by defence is the only fact that accused had not caught hold victim's hand and accused had not dragged her to his house. However, nothing further is denied by defence. Thus, evidence given by prosecutrix victim about alleged forcible sexual intercourse committed by accused upon her, remained un rebutted.

93] This is the case in which victim has mentioned the name of accused in Exh.7 as Vinod Shantanu Shinde and she has also deposed same name of accused before the court. However, name of accused as shown in charge-sheet is Vinayak Shantanu Shinde and name of one boy Vishesh is appearing in the history of sexual assault narrated by victim to PW-8 Dr. Zanwar, which is appearing in report Exh.58. I remember very well that at the time of arguments learned advocate for defence has argued that court will have to be carefully ascertain the fact that whether the boys namely Vinod Shantanu Shinde or Vishesh and accused Vinayak Shantanu Shinde are same or not. According to advocate for accused as three names of one boy are appearing in prosecution story and prosecution case, said story or prosecution case becomes doubtful. I am unable to accept said argument advanced on behalf of accused mainly because victim in her examination in chief in para No.2 has deposed that she was not knowing the accused. Hence, it is possible that on the date of incident accused may have told his name to victim as Vinod Shantanu Shinde, therefore, she may have mentioned said name of accused in Exh.7 and she may have deposed the same name of accused before the court.

94] Further in respect of the name Vishesh appearing in Exh.58 it can be said that while writing said history Doctor may have committed mistake about the name of the boy because 'Vishesh' cannot be a name. The name of the boys from Maharashtra starting with 'वि' are either Vinod, Vinayak,

Vishweshwar, Vitthal etc. but judicial note of the fact can be taken that no boy can be named with the name 'Vishesh' because the word 'Vishesh' means the specialty and it denotes the special character but it cannot be the name. In such circumstances it can be said that Doctor may have committed the mistake about the name of 'Vishesh'.

95] It is pertinent to note here that examination in chief of victim and her cross examination by prosecution was recorded on 07.09.2015 and her cross-examination by defence was recorded on 03.11.2015, hence, it becomes clear that in between examination in chief of victim and her cross-examination by defence, there was time gap of about 2 months and the possibility cannot be overruled about the fact that in said two months period accused may have won over the victim. It is pertinent to note here that in her cross-examination by defence victim has admitted that she came to know that a person by name Vinod was married, having a child, therefore, she got angry with him and felt that she could not marry with him, therefore, she has decided to file case against accused. It is also pertinent to note here that defence has suggested victim about one more incident which previously had allegedly occurred with victim and victim has admitted that allegations which are made in this case, the similar allegations were made in previous case and the matter with said previous boy was settled but the defence about said previous alleged incident is not specific. It is not specifically suggested that who was

previous boy, who had allegedly molested victim. Thus, on careful scrutiny of evidence of victim prosecutrix it becomes clear that there is no reason to disbelieve victim prosecutrix about alleged forcible sexual intercourse by accused with her.

96] On careful perusal of evidence of PW-2, 4 and 5 it is noticed that PW-4 Laxmi Waghmare was the friend of victim and after few days of the incident victim had narrated the incident to Laxmi Waghmare, who further informed said incident to PW-2 Mayuri Joshi and thereafter PW-2, 4 and 5 informed the incident to the mother of victim, consoled the mother of victim and convinced her that there was necessity to lodge the report with police. Defence has tried to take the benefit of the fact that alleged incident occurred on 20.12.2013 and First Information Report Exh.7 came to be lodged on 11.02.2014.

97] According to defence said delay is inordinate and unexplained delay, however, this is the case in which a girl of 15 years was required to suffer from forcible sexual intercourse against her will and therefore, she may have suffered from trauma. In Indian society even though the prosecutrix is at no fault and even though she is unfortunately required to suffer from heinous offence like rape, her sufferings are considered by the society as stigma upon prosecutrix, therefore, generally prosecutrix avoid to come forward. In this case already the father of prosecutrix was dead, she was residing with her mother and as deposed by her, she felt that if she will narrate

the incident to her mother, her mother may blame her or may get annoyed with her or her mother will become angry with her, hence, she might have kept mum. Thus, from the evidence on record it becomes clear that victim herself has clarified the delay and therefore, it cannot be accepted that in this case there was unexplained inordinate delay caused in lodging First Information Report.

98] I have already pointed out that the evidence of PW-2, 4 and 5 is referred above in detail and I have already pointed out that nothing is on record to show that those witnesses have any grudge against accused or those witnesses have enmity with him. It is settled principle of law that even the sole testimony of prosecutrix is sufficient to hold accused guilty for the offence of rape if the testimony of prosecutrix is inspiring confidence and it is having truthfulness. This is the case in which victim was not knowing accused previously and as mentioned in First Information Report and as deposed by victim, in the month of December 2013 accused had committed forcible sexual intercourse with her, hence, there is nothing on record to show that victim had any reason to implicate accused in a false case. Thus, from the trustworthy evidence of victim and from the fact that her testimony about forcible sexual intercourse by accused with her remained unrebutted, I have no hesitation to hold that prosecution has proved beyond reasonable doubt that on 20.12.2013 at 12.30 hours accused had committed forcible sexual intercourse with victim, who was aged below 16 years as

on the date of said incident. I have already come to conclusion that age of victim as on the date of incident was below 16 years and victim has deposed unequivocally about the forcible sexual intercourse committed accused, hence, presumption under Section 29 and 30 of POCSO Act, 2012 become applicable against accused.

99] This is the case in which accused is prosecuted for the offence punishable under Section 3 of POCSO Act, hence, presumption under Section 29 becomes applicable against accused and as provided by Section 29 of the POCSO Act, when the accused is prosecuted for committing offence under Section 3 of POCSO Act, special Court shall presume that accused had committed the offence. As the word 'shall presume' are used in Section 29 of the Act and as I have already observed that victim in unequivocal words has deposed about alleged forcible sexual intercourse committed by accused with her, this court is required to presume that accused had committed said offence. As the presumption under Section 29 of POCSO Act is made applicable against accused it was for accused to rebut said presumption because said presumption is definitely rebuttable but I have already pointed out that the evidence of prosecutrix about actual forcible sexual intercourse committed by accused with her remained unrebutted because defence even has not suggested victim that accused has not committed any such act. Thus, even though there is rebuttable presumption there is no evidence on record for rebuttal of said presumption. On this count also I find

that prosecution has successfully proved the fact that accused had committed forcible sexual intercourse with victim, who was having the age below 16 years at the time of incident.

100] Section 30 of POCSO Act provides that, “In the prosecution for any offence under POCSO Act, which requires culpable mental state on the part of accused, court shall presume existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence”.

101] On perusal of Section 375 and 376 of IPC it becomes clear that penetration against the will of prosecutrix or without her consent is the essential ingredient for commission of said offence. In this case as already pointed out the age of victim was below 16 years and the POCSO Act is made applicable to accused, hence, no question arises of the consent of victim for alleged act of accused. I thought it necessary to refer here about the consent of victim because defence has suggested victim that she came to know that accused was married having child therefore, she got angry with him and felt that she could not marry with him thus, defence has tried to suggest that victim was in contact with accused and she was intending to marry with him and thus, it seems that while cross examining victim, defence has tried to suggest victim that she had given consent to accused for alleged act, however, said suggestion is not given by defence in clear words.

102] On perusal of evidence of PW-4 Laxmi Waghmare it is noticed that defence has suggested PW-4 that accused was boy friend of victim and victim was in search of boy friend, she used to like him and she was having one sided love with accused. Thus, on careful scrutiny of evidence of PW-4 also it is noticed that defence has tried to suggest PW-4 that victim was consenting party to alleged act, however, I have already observed that no question arises of the consent of victim in this case because she was the child as defined by provisions of POCSO Act as on the date of incident. Thus, on the basis of above discussed evidence, I find that prosecution has proved the fact that accused had committed penetrative sexual assault on victim, who was below the age of 16 years at the time of incident and thereby prosecution has proved the fact that accused has committed offence punishable under Section 376 of IPC along with Section 3 r.w. Section 4 of POCSO Act. For all above reasons I have recorded my findings against points No. 1 and 2 in affirmative.

103] Prosecution has alleged that accused had committed sexual harassment of victim by repeatedly following her or watching her and by saying that he used to like her with sexual intent. However, I have already pointed out that victim has not deposed before the court about the previous conduct of accused and she has unequivocally with confidence has deposed only about the penetrative sexual assault committed by accused with her on 20.12.2013. As such, there is no evidence on record to

prove the fact that accused had committed sexual harassment of victim by repeatedly following her, hence, I find that prosecution has failed in proving the fact that accused has committed offence punishable under Section 11 r.w. Section 12 of POCSO Act. Hence, I have recorded my findings against point No.3 in negative. I have already come to the conclusion that accused has committed offence punishable under Section 376 of IPC and he has also committed the offence punishable under Section 4 of POCSO Act, hence, I pause here to hear prosecution, the accused and his advocate on the point of sentence.

104] Accused who is on bail, is taken into MCR and matter is adjourned to 04.12.2023 for hearing on the point of sentence.

Pune.

Date : 2nd December 2023

(K.P. Nandedkar)

Additional Sessions Judge, Pune.

105] Resumed at 1.45 p.m. Accused Vinayak Shantwan Shinde is produced by Jail authorities before the court. Heard accused in person. Defence advocate Mr. H.H. Darekar and learned APP Smt. Kale and learned APP Mr. Wadekar. Accused has submitted that minimum sentence provided by law may be awarded. Learned defence Adv. Mr. Darekar has submitted that submissions made by accused may be considered along with the age of accused, who is of 37 years only as on today and the fact

that he is the only earning member of his family upon whom his wife and children are depending, the minimum sentence provided by law may be awarded. Learned APP Smt. Kale and learned APP Mr. Wadekar submitted that offence committed by accused is not only committed against the Victim but it is a heinous crime against the society. Hence, according to learned APP maximum sentence provided by law may be awarded to accused.

106] As the court has come to conclusion that accused is found guilty for the offence punishable 376 of IPC, it becomes necessary to point out here that the punishment for offence punishable under Section 376 of IPC is the imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life, and accused shall also be liable to fine and punishment for the offence under Section 3 which is punishable under Section 4 of POCSO Act, is the rigorous imprisonment for a term which shall not be less than 20 years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.

107] At this juncture learned advocate for accused submitted that offence in this case was committed on 20.12.2013 and as on said date the POCSO Act, 2012 will have to be made applicable to this case and amended Section 4 of POCSO Act, which is inserted in POCSO Act, by the amendment of the 2018,

which came into effect from 21.04.2018, cannot be made applicable to present case. Advocate Mr. Chavan submitted that retrospective effect cannot be given to the amendments in criminal Laws in respect of punishment. Learned APP fairly submitted that as retrospective effect cannot be given to the amendment in respect of punishment, court will have to award the sentence of life imprisonment for accused for the offence punishable under Section 4 of POCSO Act. Hence, it becomes necessary to point out that as provided by Section 42 of POCSO Act which provides for alternate punishment as offence punishable under Section 376 of IPC and Section 4 of POCSO Act is proved against accused, punishment under POCSO Act and punishment under IPC are having same degree, the punishment under POCSO Act, will have to be awarded to accused.

108] I have given serious consideration to the submissions made on behalf of parties. I have have perused Section 376 of IPC, Section 4 of POCSO Act and Section 42 of POCSO Act, 2012. This is the unfortunate case in which accused has committed rape on the victim, who was aged below 16 years. Considering the serious nature of the offence, I find that if accused will be punished with life imprisonment for the offence punishable under Section 376 of IPC with a fine of Rs. Rs.50,000/-, and he will be further punished for life imprisonment with the fine of Rs.50,000/- for the offence punishable under Section 4 of POCSO Act, said punishment will

meet the ends of justice. It is made clear that the fine amount deposited by accused shall be paid to victim from this case. For all above reasons I proceed to pass following order -

ORDER

1] Accused Vinayak Shantwan Shinde is convicted under Section 235(2) of Cr.P.C., for the offences punishable under section 376 of the Indian Penal Code and under Section 3 which is punishable under Section 4 of the Protection of Children from Sexual Offences Act, and he is sentenced to suffer imprisonment for life along with fine of Rs.50,000/- for the offence punishable under Section 376 of IPC in default of payment of fine accused shall suffer S.I. for 3 months and he is also sentenced to suffer imprisonment for life along with fine of Rs.50,000/- for the offence punishable under Section 3 punishable under Section 4 of POCSO Act and in default of payment of fine accused shall suffer S.I. for 3 months

2] Both the sentences to run concurrently.

3] Bail bonds of accused stand cancelled.

4] Seized muddemal i.e. clothes of victim and accused being worthless be destroyed after appeal period is over.

5] Fine amount deposited by accused be paid to victim of this case after appeal period is over.

6] Benefit of set off be given to accused as provided by Section 428 of Cr.P.C. for the period of detention undergone by him during investigation and/or trial is mentioned below -

Accused Vinayak Shantwan Shinde was in Custody since 12.02.2014 to 26.05.2014 and from 02.12.2023 to 03.12.2023.

7] Copy of the Judgment be provided to accused person free of costs immediately.

(Dictated and pronounced in open court)

Pune.

Date : 4th December 2023

(K.P. Nandedkar)
Additional Sessions Judge, Pune.

CERTIFICATE

I affirm that the contents of the PDF file Judgment are same word for word as per original Judgment.

Name of Steno	Mrs. S.M. Khisti Stenographer Grade I
Name of Court	Shri. K.P. Nandedkar Additional Sessions Judge, Pune.
Date of Order	04.12.2023
Order signed by PO on	04.12.2023
Order uploaded on	06.12.2023